Supreme Court, U.S.
FILED

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No. ——

In the Supreme Court of the United States

PARAGUAY HUMANITARIAN FOUNDATION, INC., F/K/A CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON, and JORGE RALPH GALLO QUINTERO,

Petitioners,

v.

BANCO CENTRAL DEL PARAGUAY, ON BEHALF AND AS ASSIGNEE OF BANCO UNION S.A.E.C.A. AND BANCO ORIENTAL S.A.I.F.E.C.A., BANCO UNION S.A.E.C.A., and BANCO ORIENTAL S.A.I.F.E.C.A.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Rule 4(m) of the Federal Rules of Civil Procedure, which expressly provides that its 120-day time limit for serving a complaint "does not apply to service in a foreign country," authorizes a district court to dismiss a complaint as untimely if a litigant attempts service in a foreign country after 120 days.

2.* Whether a defendant is entitled to setoff its contract claim against a non-party assignor against a plaintiff-assignee's judgment.

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* Petitioners intend to argue this question if the petition for a writ of certiorari is granted and raise it here in order to preserve the question.

PARTIES TO THE PROCEEDING

The following parties were defendants, counterclaimants, and third-party plaintiffs in the district court and appellants in the court of appeals: Paraguay Humanitarian Foundation, Inc., f/k/a CQZ Humanitarian Foundation, Inc., CQZ Holding Corp., Avijos, Inc., Jose M. Avila, Ronald L. Wolfson, and Jorge Ralph Gallo Quintero ("Defendants").

The following parties were plaintiffs, counter-defendants, and third-party defendants in the district court and appellees in the court of appeals: Banco Central Del Paraguay, on behalf and as assignee of Banco Union S.A.E.C.A. and Banco Oriental S.A.I.F.E.C.A., Banco Union S.A.E.C.A., and Banco Oriental S.A.I.F.E.C.A.

In the district court, John W. Tulac was a nominal defendant, and Citibank, N.A., was a garnishee.

RULE 29.6 STATEMENT

Petitioners Paraguay Humanitarian Foundation, Inc. f/k/a CQZ Humanitarian Foundation, Inc., Avijos, Inc., and CQZ Holding Corp. state that none of them has a parent corporation, and no publicly held corporation owns ten percent or more of any of their stock.

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The order of the United States Court of Appeals for the Second Circuit (App., *infra*, 1a-7a) is not reported. The opinions of the district court (App., *infra*, 10a-13a, 17a-27a, and 28a-47a) are also unreported.

JURISDICTION

The court of appeals entered judgment on February 18, 2010. The district court had jurisdiction under 28 U.S.C. § 1332. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Rule 4(m) of the Federal Rules of Civil Procedure provides:

> Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

The full text of Rule 4 is reprinted in an appendix to this petition. App., *infra*, 48a-60a.

INTRODUCTION

Rule 4(m) of the Federal Rules of Civil Procedure, by its plain text, exempts "service in a foreign country" from the requirements that a complaint be served within 120 days and that the serving party show good cause to avoid dismissal where service is not made within 120 days. Despite this clear exemption and contrary to the interpretation adopted by other courts of appeals, the court of appeals affirmed the dismissal of Defendants' third-party complaint – which Defendants had attempted to serve in Paraguay – on the grounds that Defendants had not attempted service within 120 days of filing and that Defendants had not explained their failure to do so.

The interpretation of Rule 4(m) applied by the court of appeals – entirely divorced from the text of that rule – deepens an existing split among the circuits. It threatens to exacerbate the disarray in the district courts over how the timeliness of service in a foreign country should be assessed, including whether a plaintiff must attempt to serve a defendant in a foreign country within the 120-day time limit in Rule 4(m) in order to benefit at all from the exception to this same time limit. The increasing importance and frequency of cross-border litigation in the federal courts makes uniformity on this basic question of federal civil procedure imperative. This case presents an ideal and rare opportunity for this Court to provide guidance on the meaning of Rule 4(m), and this Court should seize it.

STATEMENT

This case arises out of a series of agreements executed in 2000 between Defendants and two Paraguayan banks – Banco Union S.A.E.C.A. ("Banco Union") and Banco Oriental S.A.I.F.E.C.A. ("Banco Oriental"). Banco Union and Banco Oriental promised to invest, and did invest later that year, in a variety of development projects to be managed by Defendants. The banks' eventual breach of these agreements, however, led Defendants to file a third-party complaint against the banks, in litigation that was originally initiated by plaintiff Banco Central del Paraguay ("Banco Central"). The district court's dismissal of this complaint and the affirmance of that dismissal by the court of appeals are the primary subjects of this petition.

The parties executed their first agreement on March 13, 2000. That day, Juan Fernando Rodriguez Leith ("Rodriguez Leith"), who held a power of attorney granted by the liquidators[1] of Banco Union and Banco Oriental to manage a Reserved Funds Investment Program on the banks' behalf, JA-302–03,[2] signed a notarized Letter of Intent addressed to Defendant Paraguay Humanitarian Foundation ("PHF").[3] JA-201-02. This Letter stated the banks'

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[1] Banco Union and Banco Oriental entered liquidation proceedings in Paraguay in 1998.

[2] Throughout this petition, "JA" will be used to refer to the Joint Appendix filed with the court of appeals.

[3] The Letter of Intent was addressed more specifically to "CQZ Holding Trust Human. Foundation." CQZ Humanitarian

"intent to participate in a[] placement program[] opportunity," and that Banco Union and Banco Oriental had $16,000,000 available for placement. JA-201. The banks promised their funds to be "clean, clear, free of all liens and encumbrances and of non-criminal origin," and the banks gave PHF, "with full corporate responsibility[,] . . . full and non-restrictive exclusivity" of the assets for one year and two weeks. JA-201–02.

The parties followed up the next day, March 14, 2000, with a Joint Venture Agreement between Banco Union, Banco Oriental, and PHF, again signed by Rodriguez Leith on behalf of the banks. JA-204–07. Under this agreement, the banks were to deliver $16 million to PHF – $2 million "for the performance of initial procedures related to the investment plan," and the remaining $14 million "to be managed for purposes of the investment plan by" PHF. JA-206. A related entity, CQZ Holding Trust, was to have "the responsibility of rating the partners of the joint venture from the banking point of view." *Id.* Banco Union and Banco Oriental would "receive the profits of the investment and . . . direct them towards compliance with the parameters of the project," and the Agreement provided that "in the event the investment plan is not carried out, instruments deposited in the form of cash and/or demand draft shall be reimbursed without suffering damage or loss

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Foundation, Inc., was the predecessor organization to the Paraguay Humanitarian Foundation. JA-658–60. This petition refers to the two entities together as Paraguay Humanitarian Foundation except when quoting directly from documents that reference CQZ Humanitarian Foundation, Inc., or CQZ Holding Trust, a related entity. *See* JA-161.

of value for any reason whatsoever." *Id.* The Agreement also stated that "[t]he laws of the State of New York . . . shall govern this Joint Venture Agreement." JA-207.

A separate agreement further confirmed the terms of the investment. JA-361. This agreement discussed the envisioned "project management plan" and arose out of meetings between Defendants, representatives of Banco Union and Banco Oriental, and representatives from the government of Paraguay – a then-Director of plaintiff Banco Central, and the then-Paraguayan Superintendent of Banks. *See id.*; JA-96; JA-100.

Pursuant to these agreements, in March and April 2000, Banco Union and Banco Oriental sent the promised $16 million to two trust accounts in the United States. *See* JA-260–61; JA-285–87; JA-25. In June of 2000, Rodriguez Leith authorized the transfer of $14 million from one of the trust accounts to accounts controlled by PHF and, by letter, dictated that the funds would be in the hybrid form of a $4 million contribution and a $10 million loan, with his "understand[ing] that [the] contribution w[ould] be used to conduct a feasibility study and cost analysis of a proposed hospital project in Paraguay and to begin work on a feasibility study for infrastructure development in Paraguay," and "to pay for the reasonable operating expenses of the Foundation." JA-362. A separate "Loan Agreement" confirmed these terms. JA-364–66.

Defendants had little reason to doubt the banks' intent or their ability to provide the funds promised in the various investment agreements. Indeed, a few

months later, Defendants received a memorandum from Banco Central officials that anticipated a further $114-million equity investment by Banco Central that would also reimburse the initial $14-million investments by Banco Union and Banco Oriental. JA-367; JA-130. In addition, PHF retained the James Mintz group, an investigative services firm, to verify the provenance of the funds it had received. *See* JA-344–58. This firm confirmed that it was "unaware of any evidence that the funds at issue came from an illegal source or are connected to illegal activity." JA-345.

Shortly thereafter, PHF, in support of its mission and in accordance with its agreements with Banco Union and Banco Oriental, began investigating the possibility of building three hospitals in Paraguay, as well as an aqueduct and a gas pipeline. JA-130; JA-173; JA-97. Various of the Defendants met with several companies with expertise in designing and building hospitals to discuss the hospital needs in Paraguay. JA-173. They also met with representatives from Duke Power regarding a water pipeline, and representatives of AON regarding the insurance needs of the project. *Id.* PHF also engaged KPMG LLP to prepare a development plan. JA-97; JA-101. KPMG produced a 15-volume report on Paraguay, including a detailed, multi-phased development plan. *See id.*

Following negative and misleading reports in the Paraguayan press in January 2001, App., *infra*, 34a; JA-97, Banco Union and Banco Oriental reneged on the various investment agreements and sought an immediate return of their $16-million investment. In conjunction with this effort, representatives of these

banks executed assignments of their interests in the $16 million to Banco Central.

Acting pursuant to these assignments, Banco Central filed a lawsuit in the United States District Court for the Southern District of New York on November 1, 2001, under that court's diversity jurisdiction, alleging claims of conversion, constructive trust, and conspiracy – but no contract claims – under New York law. Along with their answer and affirmative defenses, Defendants filed counterclaims and a third-party complaint against Banco Union and Banco Oriental. Unlike the original complaint, this third-party complaint addressed the banks' breach of their agreement with Defendants. This third-party complaint is the primary focus of this petition.

In their third-party complaint, Defendants alleged that Banco Union and Banco Oriental entered into contracts with PHF in which they promised to provide $16,000,000 in financing for PHF projects. JA-100; JA-102. Defendants further alleged that the banks breached their contractual obligation to provide the financing "by imposing unreasonable and impossible conditions upon the use of their money after transferring it to [the Paraguay Humanitarian Foundation]." JA-102.

The district court granted Banco Central's motion for summary judgment on the conversion claim on January 7, 2005. App., *infra*, 28a-47a. In doing so, the district court did not address any of the issues raised in Defendants' third-party complaint: It did not ascertain the existence of the contracts, their terms, whether any party breached their contractual

promises, or whether there were any potential defenses to breach under contract law.

On October 31, 2005, the district court dismissed the third-party complaint against Banco Union and Banco Oriental pursuant to Rule 4(m), again avoiding the merits of Defendants' contract claims. App., *infra*, 17a-27a. The court acknowledged that "Rule 4(m) does not apply to service in a foreign country," *id.* at 26a, but relying only on Rule 4(m) and the practices of other courts in the district, nonetheless applied a judicially created "'flexible due diligence standard to determine whether service of process was timely.'" *Id.* (quoting *Travers Tool Co. v. S. Overseas Express Line, Inc.*, No. 98-cv-8464, 2000 WL 194781, at *1 (S.D.N.Y. Feb. 17, 2000)). Under this standard, the district court concluded "that [the] Principal Defendants ha[d] not been diligent in attempting service on Banco Union and Banco Oriental" and that "the Principal Defendants ha[d] not shown good cause for the failure of service, *see* Fed. R. Civ. P. 4(m)," and therefore dismissed Defendants' third-party complaint. *Id.* at 26a-27a.

Defendants appealed, but the court of appeals affirmed the district court's judgment by summary order dated February 18, 2010. *Id.* at 1a-7a. Like the district court, the court of appeals did not reach the merits of Defendants' contract claims at all. In affirming the banks' conversion claim, the court concluded only that the "claim is not predicated on the alleged contract" as it "does not ask for the profits of the investment, nor does it ask for the return of its

money because the investment plan was not carried out." *Id.* at 5a (internal quotation marks omitted).[4]

The court of appeals also affirmed the district court's dismissal of Defendants' third-party complaint on Rule 4(m) grounds. The court stated that it "ha[d] previously held inapplicable the foreign country exception to [Rule] 4(m)'s 120-day time limit for service where a party did not attempt service within the 120-day limit and 'ha[d] not exactly bent over backward to effect service.'" App., *infra*, 7a (quoting *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985)). Applying the Second Circuit's abuse-of-discretion standard of review generally applicable to dismissals pursuant to Rule 4(m), the court of appeals concluded that the district court did not "abuse[] its discretion" in dismissing the complaint where Defendants attempted service after 120 days had passed, and did not succeed in effecting service or explain why not. *Id.* at 7a.

Because the court of appeals affirmed the dismissal on Rule 4(m) grounds, it also did not address the merits of the contract claims in Defendants' third-party complaint – most notably, whether Banco Union or Banco Oriental had a contractual obligation to provide a $16,000,000 investment, even if their initial attempt to fulfill this obligation was defective.

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[4] The court of appeals determined that the basis for the conversion claim was that "the money was unlawfully transferred out of Paraguay," App., *infra*, 5a, presumably relying on Article 147 of the Paraguayan General Banking Law, which states, "The sums collected by the liquidator during the course of the proceeding shall be deposited in the name of the institution in liquidation, in one or more local banks." JA-646.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's Interpretation of Rule 4(m) Deepens an Existing Conflict Over the Proper Standard for Timely Service in a Foreign Country

The split of authority in the courts of appeals over the interpretation of the foreign country exception in Rule 4(m) is both deep and broad. It is starkly illustrated by a comparison of the Second Circuit's decision in this case and that of the Ninth Circuit in *Lucas v. Natoli*, 936 F.2d 432 (9th Cir. 1991) (per curiam). The Second Circuit stated here that the "foreign country exception" to the Rule is "inapplicable" "where a party d[oes] not attempt service within the 120-day limit," and affirmed the district court's exercise of its "discretion" to dismiss based on Defendants' failure to "explain why they had not been able to effect service." App., *infra*, 7a. But the Ninth Circuit in *Lucas*, faced with the same question the Second Circuit considered in this case, reached opposite conclusions.

Unlike the Second Circuit, the Ninth Circuit concluded that the plain text of the Rule[5] allowed for no other interpretation but that the 120-day time limit does not apply to service in a foreign country. *See*

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[5] The Ninth Circuit reviewed Rule 4(j), the predecessor to Rule 4(m). The last sentences of the new and old rules are the same in all relevant respects. *Compare* Fed. R. Civ. P. 4(j), 96 Stat. 2527 (1983) (superseded 1993) ("This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.") *with* Fed. R. Civ. P. 4(m) ("This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).").

Lucas, 936 F.2d at 432-33. Under the Ninth Circuit's view, a district court's dismissal for untimely foreign service could not be authorized by the Rule. The Ninth Circuit also expressly rejected the conclusion reached by the Second Circuit that the Rule requires that service be attempted within 120 days in order for the foreign country exception to apply. *Lucas*, 936 F.2d at 433.

This split goes beyond these two circuits. There is considerable disagreement amongst the courts of appeals as to whether a district court is authorized to dismiss a complaint for untimeliness where a plaintiff attempts service in a foreign country. Under the Ninth Circuit's interpretation, the fact that the time limit in Rule 4(m) does not apply where service is in a foreign country carries out the rule's clear dictate that it not serve as the basis for dismissal for delayed service in such cases, though other rules may nonetheless provide means for addressing failures to serve foreign parties. *See Lucas*, 936 F.2d at 432-33. Therefore, a district court's dismissal for untimeliness of service, as occurred in this case, would not be authorized by Rule 4(m). The Seventh Circuit appears to agree. *See Nylok Corp. v. Fastener World Inc.*, 396 F.3d 805, 806-07 (7th Cir. 2005); *O'Rourke Bros., Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 952 (7th Cir. 2000) (intimating that the proper remedy for failure to effect service in a foreign country is dismissal under Rule 41(b) for failure to prosecute rather than under Rule 4(m)). In *Nylok*, the Seventh Circuit reversed a district court's dismissal for untimely service where the plaintiff had attempted service in Taiwan and Korea. 396 F.3d at 806-07. It stated that "[t]he explicit language of this rule makes it very clear that the 120-day limit is inapplicable in cases involving

service in a foreign country." *Id.* at 807. Thus the Seventh Circuit, like the Ninth, finds that Rule 4(m) does not permit a district court to dismiss a complaint for untimeliness where service is in a foreign country. Because the Seventh and Ninth Circuits do not permit a Rule 4(m) dismissal for untimely foreign service, they do not review a district court's decision to dismiss on this ground for abuse of discretion. *See Nylok*, 396 F.3d at 806-07 (no mention of abuse of discretion standard); *Lucas*, 936 F.2d at 432-33 (same).

In contrast, both the Second and the Third Circuits state, without reference to any rule of federal procedure, that district courts have "broad discretion" to dismiss a complaint for improper service, including for untimeliness, even where service is in a foreign country. *See Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1354, at 585 (1969)); *Umbenhauer v. Woog*, 969 F.2d 25, 31-32 (3d Cir. 1992) (recognizing that there is "no time bar" where service is in a foreign country but nonetheless analyzing whether service was "eminently feasible" and reviewing the district court's dismissal for untimeliness for abuse of discretion). Both of these circuits review a district court's dismissal pursuant to Rule 4(m) for an abuse of discretion, making no exception for service in a foreign country despite the plain text of the rule to the contrary. *See* App., *infra*, 7a (citing *Nagy v. Dwyer*, 507 F.3d 161, 163 (2d Cir. 2007)); *Umbenhauer*, 969 F.2d at 32.

The courts of appeals also disagree over whether a plaintiff must attempt service within 120 days in order for the foreign country exception even to apply. The Second Circuit stated here that service must be

attempted within 120 days in order for the foreign country exception to apply. App., *infra*, 7a (citing *Montalbano*, 766 F.2d at 740). The Ninth Circuit flatly disagrees. *See Lucas*, 936 F.2d at 433 (rejecting appellants' argument that service must be attempted within 120 days). The Seventh Circuit, meanwhile, appears to align itself with the Second Circuit on this particular issue. *See Nylok*, 396 F.3d at 807 (stating that dismissal may be proper if a plaintiff "ma[kes] no attempt to begin the process of foreign service within 120 days").

This lack of coherence in the circuits exacerbates the inconsistencies in the district courts. A number of district courts have adopted a "flexible due diligence" standard to assess the timeliness of service in a foreign country.[6] But this standard has yet to be endorsed or

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[6] *See United States ex rel. Thomas v. Siemens AG*, No. 09-cv-4414, 2010 WL 1688582, at *13-14 (E.D. Pa. Apr. 23, 2010); *Parker v. Cincinnati, Inc.*, No. 08-cv-3239, 2009 WL 3585770, *1-2 (C.D. Ill. Oct. 26, 2009); *Mapping Your Future, Inc. v. Mapping Your Future Servs., Ltd.*, No. CIV. 09-4015, 2009 WL 3105565, at *3-4 (D.S.D. Sept. 23, 2009); *Meeker v. Burns*, No. 08-CV-004219 JLH, 2009 WL 2568701, at *4 (E.D. Ark. Aug. 18, 2009); *3M Co. v. Darlet-Marchante-Technologie SA*, No. 08-cv-827 (JNE/SRN), 2009 WL 1228245, at *4-5 (D. Minn. May 5, 2009); *SEC v. Shehyn*, No. 04-cv-2003, 2008 WL 6150322, at *4 (S.D.N.Y. Nov. 26, 2008); *Steinberg v. Barclay's Nominees (Branches) Ltd.*, No. 04-60897-CIV, 2008 WL 4601042, at *10 (S.D. Fla. Sept. 30, 2008); *Aqua Shield, Inc. v. Inter Pool Cover Team*, No. 05-cv-4880, 2007 WL 4326793, at *2 (E.D.N.Y. Dec. 7, 2007); *In re Bulk (Extruded) Graphite Prods. Antitrust Litig.*, No. Civ. 02-6030, 2006 WL 1084093, at *2-3 (D.N.J. Apr. 24, 2006); *Ballard v. Tyco Int'l, Ltd.*, Nos. MD-02-1335-PB, 02-1335-PB, Civ. 04-CV-1336, 2005 WL 1863492, at *5 (D.N.H. Aug. 4, 2005); *Teta v. Li*, No. Civ. A 3:02-cv-2183, 2005 WL 1668093, at *3-4 (D. Conn. July 15, 2005); *Burda Media, Inc. v. Blumenberg*, No. 97-cv-7167, 2004 WL

explicitly addressed by any of the courts of appeals. Although the Second Circuit alluded to such a standard in a non-precedential summary order in *SEC v. Gottlieb*, 88 Fed. App'x 476, 477 (2d Cir. 2004) (summary order) (stating that service in a foreign country "appears to be subject to a flexible due-diligence standard"), the court cited for support only its discussion in *Gleason v. McBride*, 869 F.2d 688, 691 (2d Cir. 1989), which applied the pre-1983 version of the Federal Rules of Civil Procedure that contained neither the 120-day time limit nor the foreign country exception that currently appears in Rule 4(m). Separately, a few district courts look to whether the time to effect service is "reasonable."[7] Other district courts – including many outside of the Ninth or

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1110419, at *5-6 (S.D.N.Y. May 18, 2004); *Res. Trade Fin., Inc. v. PMI Alloys, LLC*, No. 99-cv-5156, 2002 WL 1836818, at *4 n.3 (S.D.N.Y. Aug. 12, 2002); *Yellowave Corp. v. Mana*, No. 00 Civ. 2267, 2000 WL 1508249, at *2 (S.D.N.Y. Oct. 11, 2000); *Travers Tool Co., Inc. v. S. Overseas Express Line, Inc.*, No. 98-cv-8464, 2000 WL 194781, at *1-2 (S.D.N.Y. Feb. 17, 2000); *James v. Rutil* (S.R.L.), No. IP 95-530-C-B/S, 1997 WL 151174, at *5 (S.D. Ind. Mar. 14, 1997); *Duferco Steel, Inc. v. M/V CHENNAI*, No. 96-cv-1219, 1996 WL 467299, at *1 (E.D. La. Aug. 15, 1996); *Standard Commercial Tobacco Co., Inc. v. Mediterranean Shipping Co.*, S.A., No. 94 Civ. 7040, 1995 WL 753901, at *1-2 (S.D.N.Y. Dec. 19, 1995); *In re Bernard L. Madoff Inv. Sec. LLC*, 418 B.R. 75, 83-84 (Bankr. S.D.N.Y. 2009); *In re Teligent, Inc.*, Nos. 01-12974 (SMB), 03-3577, 2004 WL 724945, at *3 (Bankr. S.D.N.Y. Mar. 30, 2004).

[7] *See Plantation Gen. Hosp., L.P. v. Cayman Islands*, No. 09-60884-CIV, 2010 WL 731853, at *1 (S.D. Fla. Feb. 26, 2010); *Baja Devs. LLC v. TSD Loreto Partners*, No. CV-09-756-PHX-LOA, 2009 WL 2762050, at *1-2 (D. Ariz. Aug. 28, 2009); *MacGirvin v. Sook*, No. 08-cv-2197-KHV, 2009 WL 424587, at *2 (D. Kan. Feb. 19, 2009); *Nabulsi v. Nahyan*, No. H-06-cv-2683, 2008 WL 1924235, at *5-6 (S.D. Tex. Apr. 29, 2008).

Seventh Circuits – follow the Ninth Circuit's approach in *Lucas* and find that the text of the Rule controls, and that the Rule imposes no time limit for foreign service.[8] The district courts are also split over whether plaintiffs must attempt service within 120 days for the foreign country exception to apply, with roughly half holding they must,[9] and half holding that they need not[10].

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[8] *See Beightler v. Produkte Fur Die Medizin AG*, No. 3:07CV1604, 2008 WL 4160589, at *3-4 (N.D. Ohio Aug. 28, 2008); *Fordham Fin. Servs., Inc. v. Ventramex S.A. de C.V.*, No. 1:06-CV-00513, 2007 WL 1598084, at *4 (S.D. Ohio June 1, 2007); *Bekaert Progressive Composites Corp. v. Wave Cyber Ltd.*, No. 06-cv-2440, 2007 WL 1585526, at *1 (S.D. Cal. May 31, 2007); *In re Copper Antitrust Litig.*, Nos. MDL 1301, 02-C-0707-C, 2003 WL 23200370, at *1 (W.D. Wis. May 30, 2003); *Flock v. Scripto-Tokai Corp.*, No. Civ.A.H-00-3794, 2001 WL 34111630, at *4-5 (S.D. Tex. July 23, 2001); *Amylin Pharms., Inc. v. Regents of Univ. of Minn.*, No. 96-cv-2061, 1998 WL 119511, at *2 n.1 (S.D. Cal. Jan. 15, 1998); *M & R Marking Sys., Inc. v. Top Stamp, Inc.*, No. CIV. 96-828, 1996 WL 805485, at *5 (D.N.J. Nov. 20, 1996); *Kim v. Frank Mohn A/S*, 909 F. Supp. 474, 479-80 (S.D. Tex. 1995); *Pa. Orthopedic Ass'n v. Mercedes-Benz A.G.*, 160 F.R.D. 58, 60-61 (E.D. Pa. 1995); *In re Southold Dev. Corp.*, 148 B.R. 726, 729-30 (E.D.N.Y. 1992); *In re Imperial Home Decor Group, Inc.*, 294 B.R. 607, 608-09 (Bankr. D. Del. 2003).

[9] *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571, 2009 WL 691920, at *2 (S.D.N.Y. Mar. 17, 2009); *Allstate Ins. Co. v. Funai Corp.*, 249 F.R.D. 157, 161-62 (M.D. Pa. 2008); *Electroweb Media, Inc. v. Mycashnow.com, Inc.*, No. 1:02-CV-133, 2006 WL 2850132, at *8 (E.D. Tenn. Sept. 29, 2006); *Teta v. Li*, No. Civ. A 3:02-cv-2183, 2005 WL 1668093, at *3-4 (D. Conn. July 15, 2005); *Yellowave Corp. v. Mana*, No. 00 CIV. 2267, 2000 WL 1508249, at *2 (S.D.N.Y. Oct. 11, 2000).

[10] *See 3M Co. v. Darlet-Marchante-Technologie SA*, No. 08-cv-827, 2009 WL 1228245, at *4-5 (D. Minn. May 5, 2009); *Rudolph v. UT*

These conflicts in the lower courts will not be resolved without intervention by this Court. Despite the fact that district courts likely will face this question more and more frequently given the expanding number of foreign litigants in an increasingly interconnected world, *see* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 174 & nn.1-5 (2008) ("Transnational cases have become a prominent feature of the litigation landscape in the United States."); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 5 (2006) (observing that "[t]he proliferation of transnational activity and globalization" will likely cause an increase in domestic litigation involving foreign defendants), this issue does not frequently reach the courts of appeals. The question of service usually occurs at the very outset of litigation and is remedied most easily simply by re-filing the complaint; at that stage a Rule 4(m) dismissal is generally appealable only as an interlocutory order. *See Montalbano*, 766 F.2d at 738 (Rule 54(b) appeal of interlocutory order); *Lucas*, 936 F.2d at 432 (interlocutory appeal under 28 U.S.C. § 1292(b)). Given that a plaintiff usually will simply re-file a complaint rather than expend the time and effort to seek an interlocutory appeal, a district court's dismissal under Rule 4(m) is usually moot by the time the case has reached the appeal stage. This Court should take this opportunity to provide guidance to the

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Starcom, Inc., No. C 07-04578, 2009 WL 248370, at *2-3 (N.D. Cal. Feb. 2, 2009); *In re S1 Corp. Sec. Litig.*, 173 F. Supp. 2d 1334, 1343 (N.D. Ga. 2001); *Cargill Ferrous Int'l v. M/V Elikon*, 154 F.R.D. 193, 195-96 (N.D. Ill. 1994); *In re Southold Dev. Corp.*, 148 B.R. 726, 729-30 (E.D.N.Y. 1992).

lower courts regarding the requirements of Rule 4(m) when service is in a foreign country. This case is an ideal vehicle for an opinion from this Court because the issue presented is separate from the merits and because it would allow this Court to provide timely guidance to the increasing number of foreign litigants in federal courts. *See* Section C, *infra*.

B. The Court of Appeals Erred in Upholding the District Court's Dismissal for Untimely Service

The Rule 4(m) conflict in the lower courts might be traced, in part, to misplaced discomfort in some courts with the result produced by a straightforward reading of the plain text. But the Ninth Circuit was correct that "the controlling language of Rule 4([m]) [is] so clear that it allows no latitude for interpretation." *Lucas*, 936 F.2d at 433. And the absence of a time limit in the Rule "recognize[s] that the timeliness of foreign service is often out of the plaintiff's control." *Nylok*, 396 F.3d at 807; *see also Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 881 (3d Cir. 1987) (noting that "the vagaries of [foreign] service render the [120-day] time limit too burdensome on a plaintiff"). Rule 4(m) is simply unavailable to address delays in foreign service, though such delays might be addressed by other rules.

The text of Rule 4(m) is unambiguous as to its inapplicability to foreign service. For domestic service only, it authorizes a district court to "dismiss the action without prejudice against th[e] defendant or order that service be made within a specified time" if the defendant "is not served within 120 days after the

complaint is filed."[11] Fed. R. Civ. P. 4(m). "[I]f the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." *Id.* But the final sentence of the Rule is simple: "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)."

Most telling from the text of the Rule is what the Rule does not say. After stating that the 120-day time limit does not apply to service in a foreign country, it does not impose a longer time period for foreign service, and it does not authorize a district court to craft a limit of its choosing. Nor does it supply a separate standard for assessing timeliness, such as the "flexible due diligence" standard the district court supplied in this case. The last sentence of the Rule articulating the foreign country exception stands alone – emphatically silent as to any alternative standard to be used to assess the timeliness of service in a foreign country and providing no authority for district courts to dismiss complaints for untimely service in a foreign country.

The Rule's silence on these counts, however strange it might seem to some courts, did not entitle the court of appeals or district court below to fashion a judicially created standard authorizing a dismissal wholly untethered – and indeed, contradictory – to the plain

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[11] Rule 4(m) applies equally to a third-party complaint. *See* Notes of Advisory Committee on 1993 amendments to Rules ("To simplify the text, the [1993 revision of Rule 4(m)] returns to the usual practice in the rule of referring simply to the plaintiff even though its principles apply with equal force to defendants who may assert claims against non-parties under Rules 13(h), 14, 19, 20, or 21.").

text of the Rule. The only fair conclusion from this text is that the 120-day time limit does not apply to service in a foreign country, and that a district court may not dismiss a complaint on Rule 4(m) grounds for exceeding that time limit for service. The court of appeals below erred by failing to give the text of Rule 4(m) its full and straightforward effect.

The requirement imposed by the court of appeals that Defendants show that they had attempted service within 120 days in order to gain the benefit of the foreign country exception, *see* App., *infra*, 7a, is also nowhere in the text of the Rule. In fact, the final sentence is clear that it is not just the 120-day time limit that does not apply to service in a foreign country, but the entirety of subsection (m). Where it is clear that service is in a foreign country, the Rule does not permit *any* time limit arising from subsection (m), specifically. Although it might be reasonable to require that foreign service be attempted within 120 days of filing, the rulemakers did not do so.

Similarly, the requirement imposed by the court of appeals and the district court below that the Principal Defendants "explain why they had not been able to effect service," App., *infra*, 7a, or show due diligence[12] or good cause, App., *infra*, 26a-27a, finds no support in the text of the Rule. Again, as Rule 4(m) makes clear, where service is in a foreign country, the entire

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[12] "Due diligence" is typically treated as a prerequisite for "good cause." *See Zamot v. Merit Sys. Prot. Bd.*, 332 F.3d 1374, 1377 (Fed. Cir. 2003) ("To establish good cause for a filing delay, an appellant must show that the delay was excusable under the circumstances and that the appellant exercised due diligence . . . .").

subsection – including the requirement that a plaintiff show "good cause" for failure to effect timely service – simply does not apply. The last sentence of the Rule would be rendered superfluous by a requirement that a plaintiff attempting to effect foreign service show good cause for untimeliness – the Rule in that case already would require that the district court "extend the time for service for an appropriate period," Fed. R. Civ. P. 4(m), and there would be no need to create an exception to the otherwise applicable time limit. The court of appeals and district court erred by imposing their own good-cause requirement untethered from Rule 4(m)'s text when, by the express terms of the Rule, service in a foreign country is exempted from that requirement.

Although the absence of a time limit for foreign service in Rule 4(m) might seem a strange result at first blush, the Ninth Circuit's observation that "[w]hether or not the Rules of Civil Procedure should be amended to deal more adequately with the question of service in foreign countries is not for [the courts] to decide" is apt. *See Lucas*, 936 F.2d at 433. Moreover, as the Seventh Circuit has noted, district courts still have recourse under the Rules to move a case along; for instance, a district court might be entitled to dismiss a case under Rule 41(b) for failure to prosecute. *See O'Rourke*, 201 F.3d at 952. But the district court in this case did not purport to exercise its discretion to dismiss pursuant to Rule 41(b) in this case, and its decision therefore cannot be upheld on that ground. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 438-40 (1983).

Simply put, in this case, where Defendants attempted to serve their third-party complaint in a

foreign country, the district court was not permitted to dismiss that complaint for failure to comply with the time limit and good-cause requirements in Rule 4(m). The decision of the court of appeals upholding the dismissal was error.

C. The Question Presented Is an Important One that Should Be Settled by this Court

The primary question raised in this petition is narrow and specific, and it addresses a broadly applicable rule of federal civil procedure governing one of the most basic requirements for initiating a lawsuit. This case presents an ideal and rare vehicle for answering this question, as the question of Rule 4(m)'s applicability is not moot here and is entirely separate from the overall merits. This Court's review would also be well-timed in light of the many opportunities the lower courts have had to weigh in on this question, and in light of the increasing importance and frequency of cross-border litigation in the federal courts.

The potential complexity and difficulty of accomplishing foreign service is reflected in the myriad methods for effecting service in a foreign country provided by Rule 4(f). The explicit exception to time limits for foreign service in Rule 4(m) reflects a recognition that a 120-day deadline for service in a foreign country would not fairly account for the real-world difficulty and expense of successfully effecting foreign service. The exception also recognizes that such a deadline would be unfair to litigants seeking to obtain redress from foreign parties, since the service process itself easily can take more than 120 days. *See, e.g.*, *Nylok*, 396 F.3d at 807.

Clarity and uniformity regarding the requirements for service and when service can be deemed timely or untimely under the Federal Rules is important not just for plaintiffs, but for foreign defendants as well. The standard for dismissing a complaint for untimely service should not depend on whether a domestic plaintiff has opted to sue in the Ninth Circuit rather than the Second Circuit. This Court's review would provide much-needed certainty to litigants of all types, as well as to the district courts that will adjudicate their disputes.

This petition also involves a more fundamental question – where to draw the line between permissible judicial interpretation of the Federal Rules of Civil Procedure and impermissible judicial rule-making that does not comply with the procedures in the Rules Enabling Act, *see* 28 U.S.C. § 2074. Absent a formal change in rules as provided by this statute, this Court should require a strict adherence to the plain text of any federal rule of civil procedure.

Finally, the time is now right for this Court to address the question of timing for foreign service. The courts of appeals, and many district courts, have already encountered this issue under a variety of factual scenarios and they have reached sharply diverging conclusions, resulting in a patchwork of conflicting standards. At the same time, the issue of service in a foreign country will only become more common as countries become more interconnected with ours, and as economies become more global. The deep, existing split in authority on Rule 4(m) will grow more untenable if this Court declines to answer the relatively straightforward question presented by this petition, particularly as litigants select forums with

Rule 4(m) interpretations more favorable to their interests.

D. Petitioners Also Intend To Argue that the Court of Appeals Erred in Failing To Allow Them To Setoff Their Contractual Claims Against Banco Union and Banco Oriental Against Banco Central's Judgment

Neither the district court nor the court of appeals below has ever addressed the merits of Defendants' breach of contract claims against Banco Union and Banco Oriental, which Defendants raised in their third-party complaint and in a counterclaim against Banco Central. Even assuming Defendants' liability for conversion as innocent recipients of an illegal transfer of funds out of Paraguay,[13] the banks may still have a contractual obligation to provide the $16-million investment to Defendants from another, legal source.[14]

An assignee's claim – such as Banco Central's claim for conversion here – is subject to setoff by way of a defendant's counterclaims against the assignor – here,

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[13] Innocent parties, like Defendants here, may still be liable for conversion under New York law. *See, e.g., Employers' Fire Ins. Co. v. Cotten*, 245 N.Y. 102, 103-05 (1927).

[14] A contract claim can exist independent of a claim for conversion under New York law. *See, e.g., N. Shore Bottling Co. v. C. Schmidt & Sons, Inc.*, 22 N.Y.2d 171, 179 (1968) ("[I]t is . . . plain that a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." (citing, *inter alia*, *Rich v. N.Y. Cent. & Hudson River R.R. Co.*, 87 N.Y. 382, 398 (1882))).

Defendants' breach of contract counterclaims and cross-claims against Banco Union and Banco Oriental. *See First Nat'l Bank of Boston (Int'l) v. Banco Nacional de Cuba*, 658 F.2d 895, 902 (2d Cir. 1981) ("When a plaintiff sues on a claim as an assignee, the defendant may assert a counterclaim against the assignee based on a right of action against the assignor; the defendant's recovery on such a counterclaim, however, is limited to the amount of the assignee's recovery."); Samuel Williston & Richard A. Lord, *A Treatise On the Law Of Contracts* § 74:48 (4th ed. 2008) ("[T]he general principle allow[s] setoff against the assignee of claims due from the assignor."); *see also N. Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 615-23 (1894) (equitable setoff is available against assignee of action based on liability of assignor).

As alleged in Defendants' third-party complaint, Banco Union and Banco Oriental are contractually liable to Defendants based on the various agreements between them, and Banco Central's judgment on its conversion claim is subject to setoff for that liability. If the Court grants this petition for a writ of certiorari, Petitioners intend to argue that the court of appeals erred by failing to allow Defendants to setoff Banco Central's claim by any amount by which Banco Union and Banco Oriental are liable to Defendants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 19, 2010

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08-4908-cv

[Filed February 18, 2010]

DEF,

Defendant,

RONALD L. WOLFSON,
JORGE GALLO QUINTERO,

Defendants-Appellants,

PARAGUAY HUMANITARIAN FOUNDATION, INC., formerly known as CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., and JOSE M. AVILA,

Defendants-Counterclaimants-Third Party Plaintiffs-Appellants,

v.

ABC,

Plaintiff,

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of BANCO UNION S.A.E.C.A. in liquidation and BANCO ORIENTAL S.A.I.F.E.C.A. in liquidation,

Plaintiffs-Counter-Defendants-Third Party Defendants-Appellees,

JOHN W. TULAC,

Nominal Defendant,

CITIBANK, N.A.,

Garnishee.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of February, two thousand ten.

Present:

ROBERT D. SACK,
ROBERT A. KATZMANN,
Circuit Judges,
RICHARD J. SULLIVAN,
*District Judge.**

Appeal from the United States District Court for the Southern District of New York (Keenan, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the judgment of the district court be and hereby is **AFFIRMED**.

This case arises out of the transfer of sixteen million dollars from two Paraguayan banks in liquidation to bank accounts in the United States. Plaintiff Banco Central Del Paraguay ("Banco Central") brings an action for conversion as assignee of Banco Union and Banco Oriental, the two Paraguayan banks in liquidation. The district court granted summary judgment in favor of Banco Central on its conversion claim and dismissed defendants' counterclaims and third party complaint. Defendants Ronald L. Wolfson, Jorge Ralph Gallo Quintero,

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*The Honorable Richard J. Sullivan, United States District Judge for the Southern District of New York, sitting by designation.

Paraguayan Humanitarian Foundation, CQZ Holding Corp., Avijos, Inc., and Jose M. Avila now appeal. We assume the parties' familiarity with the facts and procedural history of the case.

Defendants challenge Banco Central's standing to bring this action. Defendants argue that the assignments through which Banco Union and Banco Oriental assigned their claim are invalid under Paraguayan law. Therefore, according to defendants, Banco Central does not have a legal interest in the claim and does not have standing to bring suit. *See W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 108 (2d Cir. 2008) ("[T]he minimum requirement for an injury-in-fact is that the plaintiff have legal title to, or a proprietary interest in, the claim."). Defendants point to the declaration of Alfredo Enrique Kronawetter, a Paraguayan lawyer, for the proposition that the assignments are invalid. The district court did not consider the Kronawetter declaration because it was submitted four months after the close of briefing.

We have reviewed the Kronawetter declaration and conclude that it is insufficient to raise a genuine issue of material fact in dispute that would preclude summary judgment. As evidence of the assignments, Banco Central submitted the actual assignments, Joint Appendix ("JA") at 265-68, as well as subsequent ratifications of the assignments by the liquidators and declarations of the liquidators expressing support for the lawsuit. JA 385-87, 435-51, 453-54. The Kronawetter declaration states that the assignments "do not combine the necessary formalities and conditions so that such means are effective, for not having had it carried out under the decree of article

389 of the Paraguayan Civil Code." JA 676. This statement is entirely conclusory and defendants do not even provide the Court with a copy of article 389 or any explanation of why the assignments do not comply with Paraguayan legal formalities. Defendants therefore fail to raise a genuine issue of material fact in dispute precluding summary judgment.

Defendants argue that the district court erred when it granted summary judgment on Banco Central's conversion claim because a conversion claim may not be predicated on a mere breach of contract. But Banco Central's claim is not predicated on a mere breach of contract. Instead, it "spring[s] from circumstances extraneous to, and not constituting elements of, the [alleged] contract . . . ." *See Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987); *see also In re September 11 Litig.*, 640 F. Supp. 2d 323, 338 (S.D.N.Y. 2009) ("[C]ontract and tort claims for relief may coexist in limited circumstances . . . when a defendant's tortious conduct is separate and apart from its failure to fulfill its contractual obligations.") (internal quotation marks and alterations omitted). Here, Banco Central's claim is not predicated on the alleged contract. Banco Central does not ask for the "profits of the investment," nor does it ask for the return of its money because the investment plan was not carried out. JA 206. Instead, Banco Central demands the return of the sixteen million dollars because the money was unlawfully transferred out of Paraguay.

Defendants further contend that the district court erred when it dismissed defendants' counterclaims and third party complaint. Defendants brought counterclaims against Banco Central for interference

with a contract and against the banks-in-liquidation for breach of contract. The district court correctly dismissed these claims pursuant to the "opposing party" requirement of Federal Rule of Civil Procedure 13. Banco Central is not an "opposing party" because the interference with a contract claim is brought against Banco Central in its regulatory capacity and not in its capacity as assignee of the two banks-in-liquidation. *See Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 885 (2d Cir. 1981) (holding that generally, under the "opposing party" requirement, "when a plaintiff has brought suit in one capacity, the defendant may not counterclaim against [the plaintiff] in another capacity"). The banks-in-liquidation, which are not named parties, are not "opposing part[ies]" because they have assigned their claims and so they are not the real parties in interest in the litigation nor the parties controlling the litigation. *See Banco Nacional de Cuba v. First Nat'l City Bank of N.Y.*, 478 F.2d 191, 193 (2d Cir. 1973) (concluding that a counterclaim could be brought against the Republic of Cuba, though unnamed, because the Republic of Cuba and Banco Nacional de Cuba, the plaintiff, acted as a single entity); *see also Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 392 (3d Cir. 2002) (concluding that an assignee was an "opposing party," stating that "[i]t is significant that the [assignee] . . . was actually the party controlling the litigation in both actions . . . . This is an essential component of our analysis.").

Defendants' third-party complaint against the banks-in-liquidation was also correctly dismissed. Defendants waited two years before attempting to serve process on the banks-in-liquidation and never

successfully served process on them. We have previously held inapplicable the foreign country exception to Federal Rule of Civil Procedure 4(m)'s 120-day time limit for service where a party did not attempt service within the 120-day limit and "ha[d] not exactly bent over backward to effect service." *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985). Likewise we do not find that the district court abused its discretion here where defendants waited two and a half years to attempt service, never effected service, and did not explain why they had not been able to effect service. *See Nagy v. Dwyer*, 507 F.3d 161, 163 (2d Cir. 2007) ("We review for abuse of discretion a district court's dismissal of an action for failure to timely serve the defendant.").

We have considered the remainder of defendants' arguments and conclude that they lack merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 9649 (JFK)

[Filed July 29, 2008]

BANCO CENTRAL DEL PARAGUAY, et al.
Plaintiff,

-against-

PARAGUAY HUMANITARIAN FOUNDATION, INC., et al.,
Defendants.

[Rule 54(6)]
JUDGMENT

Whereas the above-captioned action having come before this Court, and the matter having come before the Honorable John F. Keenan, United States District Judge, and the Court, on July 28, 2008, having rendered its Memorandum Opinion and Order that there is no just reason for delay, pursuant to Fed. R. Civ. 54(b), directing the Clerk of the Court to enter final judgment with respect to the Court's granting of summary judgment with respect to Count I of the amended complaint and denying the principal

defendants application to have Counts II and III dismissed with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Opinion and Order dated July 28, 2008, there is no just reason for delay, pursuant to Fed. R. Civ. 54(b), final judgment is entered with respect to the Court's grant of summary judgment with respect to Count I of the amended complaint and the principal defendants application to have Counts I and III dismissed with prejudice is denied.

Dated: New York, New York
July 29, 2008

J. MICHAEL McMAHON

Clerk of Court

BY: /s/

Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

01 Civ. 9649 (JFK)

[Filed July 28, 2008]

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of Banco Union S.A.E.C.A. in liquidation and Banco Oriental S.A.I.F.E.C.A. in liquidation,

Plaintiff,

-against-

PARAGUAY HUMANITARIAN FOUNDATION, INC. f/k/a CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON and JORGE RALPH GALLO QUINTERO,

Principal Defendants.

MEMORANDUM OPINION and ORDER

JOHN F. KEENAN, United States District Judge:

By Order dated January 4, 2006, the Court entered partial summary judgment in favor of Plaintiff Banco Central de Paraguay ("Banco Central" or "Plaintiff") on Banco Central's claim of conversion (Count I of Banco Central's Amended Complaint). By Order dated November 29, 2006, the Court granted Banco Central's motion to dismiss its remaining claims (Counts II and III of the Amended Complaint) without prejudice. On September 5, 2007, the Court denied Principal Defendants' "Motion for a New Trial Under FRCP 59," by which the Principal Defendants sought to overturn the Court's grant of summary judgment on Count I. Principal Defendants subsequently filed a Notice of Appeal from various prior Orders of this Court.

On January 11, 2008, however, the parties stipulated that Principal Defendants' appeal must be withdrawn as premature, in light of the fact that Counts II and III were dismissed without prejudice. *See Chappelle v. Beacon Communications Corp.*,84 F.3d 652, 654 (2d Cir. 1996). The stipulation provided that Principal Defendants would not be precluded from appealing a final judgment or from a grant of certification of the judgment as final, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Principal Defendants now move the court to direct an entry of final judgment as to Count I, pursuant to Rule 54(b). Principal Defendants also ask that the Court require Plaintiff to "fully and finally abandon" Counts II and III and dismiss those counts with prejudice.

Rule 54(b) provides, in relevant part:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the

> entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Three factors govern the applicability of Rule 54(b): (i) whether multiple, separate claims exist, (ii) whether one of them has been finally determined, and (iii) whether there is no just reason for delay of an appeal. Even if these conditions are met, discretion to order Rule 54(b) certification remains with the district court. *Shrader v. Granninger*, 870 F.2d 874, 877 (2d Cir. 1989). Here, all three factors weigh in favor of certification under Rule 54(b). First, there are multiple claims. Second, Count I has been "finally determined" by the Court's grant of summary judgment on that count in Plaintiff's favor. Third, there is no just reason for delay of an appeal: the without-prejudice voluntary dismissal of the remaining claims has rendered those claims essentially dormant. Further, Banco Centrale does not oppose the entry of final judgment as to Count I pursuant to Rule 54(b). Accordingly, the Court in its discretion grants Rule 54(b) certification with respect to the grant of summary judgment in Banco Centrale's favor on Count I.

Plaintiff opposes, however, Principal Defendants' request that the Court direct Counts II and III to be dismissed with prejudice. Plaintiff correctly notes that there is no basis for Principal Defendants' application. The Court's Memorandum Opinion and Order of November 29, 2006, granted Plaintiff's motion for voluntary dismissal of the remaining claims *without prejudice* and explained at considerable length the reasoning behind the decision. *See Banco Centrale de*

Paraguay v. Paraguay Humanitarian Foundation, Inc., No. 01 Civ. 9649 (JFK), 2006 U.S. Dist. LEXIS 87093 (S.D.N.Y. Nov. 29, 2006). Banco Centrale has offered no good reason why the Court should now overturn its prior Order.

Because there is no just reason for delay, pursuant to Rule 54(b), the clerk is directed to enter final judgment with respect to the Court's grant of summary judgment in Plaintiff's favor with respect to Count I of the Amended Complaint. Principal Defendant's application to have Counts II and III dismissed with prejudice is denied.

SO ORDERED.

Dated: New York, New York
July 28, 2008

/s/John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 9649 (JFK)

[Filed January 4, 2006]

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of Banco Union S.A.E.C.A. in liquidation and Banco Oriental S.A.I.F.E.C.A. in liquidation,

Plaintiff,

-against-

PARAGUAY HUMANITARIAN FOUNDATION, INC. f/k/a CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON and JORGE RALPH GALLO QUINTERO,

Principal Defendants,

-and-

JOHN W. TULAC,

Nominal Defendant.

JUDGMENT

This diversity action having come before the Court upon the filing of Plaintiff's Complaint on November 1, 2001; and the Court having granted Plaintiff summary judgment as to the principal defendants on Count I of Plaintiff's Amended Complaint and denied all other motions for summary judgment in an Opinion dated January 6, 2005; and the Court having dismissed Principal Defendants' counterclaim with prejudice and Principal Defendants' third-party complaint without prejudice in an Opinion and Order dated October 31, 2005; it is now ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiff shall recover from Principal Defendants Paraguay Humanitarian Foundation, Inc., f/k/a CQZ Humanitarian Foundation, Inc., CQZ Holding Corp., Avijos, Inc., Jose M. Avila, Ronald L. Wolfson and Jorge Ralph Gallo Quintero, jointly and severally, the sum of $16,000,000. Plaintiff is awarded prejudgment interest, calculated in accordance with N.Y. CPLR 5001 and 5004 at the rate of 9% per annum from November 1, 2001 through January 3, 2006, in the amount of $6,012,493.15. Plaintiff also is awarded postjudgment interest to be calculated in accordance with 28 U.S.C. § 1961 at the rate of 4.36% (the weekly average one-year constant maturity Treasury yield for the week ending December 30, 2005), compounded annually, from the date of entry of this judgment until payment;

2. Ten days after entry of this Judgment, the account funds subject to the Court's Order of Attachment dated November 15, 2001 shall be transferred by granishee Citibank, N.A. to plaintiff

Banco Central de Paraguay, c/o Hughes Hubbard & Reed LLP Attorney Escrow Account, Citibank, ABA Number 021000089, 666 Fifth Avenue, 5th Floor, New York, New York 10103, Attn: Gail Mauceli, Account Number 09117491, to perfect the levy of the Order of Attachment pursuant to N.Y. CPLR 6214 and in partial satisfaction of this Judgment;

3. Upon the transfer of the funds set forth in paragraph 2 above, the Attachment Bond shall be deemed discharged and released and the Clerk of the Court shall return the original Attachment Bond to counsel for plaintiff Banco Central de Paraguay, c/o Hughes Hubbard & Reed LLP, Attn: Daniel H. Weiner, Esq., One Battery Park Plaza, New York, New York 10004-1492; and

4. The Court shall maintain jurisdiction of this action for the purpose of enforcing this Judgment.

Dated: New York, New York
January 3, 2006

/s/John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 9649 (JFK)

[Filed October 31, 2005]

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of Banco Union S.A.E.C.A. in liquidation and Banco Oriental S.A.I.F.E.C.A. in liquidation,

Plaintiff,

-against-

PARAGUAY HUMANITARIAN FOUNDATION, INC. f/k/a CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON and JORGE RALPH GALLO QUINTERO,

Principal Defendants.

-and-

JOHN W. TULAC,

Nominal Defendant,

OPINION AND ORDER

Appearances:

For Plaintiff Banco Central de Paraguay and Third-party Defendants Banco Union S.A.E.C.A. and Banco Oriental S.A.I.F.E.C.A.

HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
Of Counsel: Daniel H. Weiner, Esq.

For Principal Defendants and Third-party Plaintiffs Paraguayan Humanitarian Fdn., CQZ Holding Corp., Avijos, Inc., Jose M. Avila, Ronald L. Wolfson and Jorge Ralph Gallo Quintero

CUBITT & CUBITT
186 East Huron Ave.
Bad Axe, Michigan 48413
Of Counsel: H. Dale Cubitt, Esq.

JOHN F. KEENAN, United States District Judge:

Plaintiff Banco Central de Paraguay ("Banco Central") moves to dismiss the Principal Defendants' counterclaim in this matter. Third-party defendants Banco Union S.A.E.C.A. in liquidation ("Banco Union") and Banco Oriental S.A.I.F.E.C.A. in liquidation ("Banco Oriental") move to dismiss the Principal Defendants' third party complaint. For the reasons that follow, the motions are granted.

BACKGROUND

This case involves the diversion of $16 million from two insolvent Paraguayan banks, Banco Union and Banco Oriental, to Citibank trust accounts maintained by Nominal Defendant John W. Tulac and the Principal Defendants. Familiarity with the underlying facts is presumed. *See Banco Central de Paraguay v. Paraguayan Humanitarian Fdn.*, No. 01 Civ. 9649, 2005 WL 53271 at *1-4 (S.D.N.Y. Jan. 7, 2005). In Count One of its amended complaint, Banco Central alleged that the Principal Defendants and Tulac had converted the $16 million. On January 7, 2005, the Court granted Plaintiff's motion for summary judgment on this count as to the Principal Defendants, but not as to Tulac.

A. Counterclaim

The counterclaim alleges that in March 2000, the Principal Defendants reached an agreement with certain Paraguayan officials concerning "project financing" for Paraguay. (Countercl. ¶ 1). To this end, Banco Union transferred $2 million to a trust account at Citibank in New York maintained by Principal Defendant CQZ Holding Corporation. (*Id.*). Subsequently, the Paraguayan superintendent of banks, the president of Banco Central and representatives from the liquidated banks allegedly reached an agreement "to seek a form of 100% non-recourse project financing sponsored by the United States." (*Id.*). In April 2000, allegedly to this end, the two liquidated banks deposited $14 million into a Citibank trust account in New York as an initial equity reserve. (*Id.*). Principal Defendants further allege that on August 2, 2000, Banco Central

committed the sum of $114,152,088 in writing to Principal Defendant CQZ Humanitarian Foundation. (*Id.*). Project financing was supposedly "approved" in late 2000, but Principal Defendants claim that Banco Central never paid the funds and that they ultimately were blocked. (*Id.*). According to the Principal Defendants, the CQZ Humanitarian Foundation (later known as Principal Defendant Paraguayan Humanitarian Foundation) ("PHF") could not move forward with the Paraguayan project. (*Id.*).

Principal Defendants claim that they had "multiple contracts" with the two liquidated banks, and a written contractual commitment from Banco Central for equity in order to arrange the non-recourse project financing. (*Id.* ¶ 2). The Principal Defendants allege that the liquidated banks "impos[ed] unreasonable and impossible" conditions upon the use of their funds after the transfer, and that Banco Central "reneged" on its commitment and interfered with the contractual relations between PHF and the liquidated banks. (*Id.* ¶ 4). Defendants contend that they have sustained "compensatory and consequential damages" and that they are "entitled to a humongous and bodacious amount of punitive damages." (*Id.* ¶ 5, 8).[1]

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[1] While "humongous" means "very large," the Court never before has encountered a demand for a "bodacious" amount of punitive damages. According to the online *Oxford English Dictionary* (www.oed.com), in the nineteenth century, "bodacious" meant "complete," "thorough" or "arrant" (e.g. "Air ye turned a bodacious idjit, Skimp?"). Acknowledging that language evolves toward a state of perfection, the O.E.D. lexicographers also list a few late twentieth-century usages: e.g. "excellent" and "fabulous" ("Those bodacious dudes have an excellent time playing games with death."). The final O.E.D. definition is "sexually attractive," but

Banco Central moves to dismiss the counterclaim on three grounds. First, Banco Central argues that it brought suit in its capacity as the assignee of the two banks in liquidation, but that the Principal Defendants impermissibly have asserted claims against Banco Central in its regulatory capacity as the highest banking authority in Paraguay. Second, and related, Banco Central argues that the Foreign Sovereign Immunities Act ("FSIA") bars suit against it in its regulatory capacity. Third, Banco Central argues that the act of state doctrine bars the counterclaim. Principal Defendants respond that Banco Central alleged in the amended complaint that it was acting as the assignee of the liquidated banks, not solely as a regulator; thus, it is vulnerable to counterclaims and cannot hide behind the FSIA. Principal Defendants argue that the act of state doctrine is inapplicable because it only applies to public official acts by foreign sovereigns in their own territories, and because the doctrine has a commercial activity exception.

B. Third Party Complaint

The allegations in the Principal Defendants' third party complaint are nearly identical to those in the counterclaim. The only substantive differences are (i) the third party complaint is asserted against Banco Union and Banco Oriental, not Banco Central, and (ii) the third party complaint contains allegations against Citibank. These allegations are now moot because the

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that example will not be used in the main text because the Court prefers that its opinions not appeal to prurient interests. Suffice it to say that the Principal Defendants are looking for some Brobdingnagian punitive damages.

Principal Defendants discontinued the third party action as to Citibank with prejudice. (Dkt. # 70).

DISCUSSION

A. Rule 12(b)(6) Standards

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court's task is to assess the legal feasibility of the claim rather than to weigh the evidence that might be offered in support thereof. *See, e.g., Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). Accordingly, the Court accepts the counterclaiming defendants' factual allegations as true and draws all reasonable inferences in their favor. *See Masefield AG v. Colonial Oil Industries*, No. 05 Civ. 2231(PKL), 2005 WL 2105542 at *2 (S.D.N.Y. Sept. 1, 2005). Plaintiffs' motion will be granted only if it appears beyond doubt that the defendants can prove no set of facts in support of their claim that would entitle them to relief. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993).

B. Counterclaim

Generally, under the "opposing party" requirement in Fed. R. Civ. P. 13, when a plaintiff commences an action in one capacity, the defendant may not assert a counterclaim against that plaintiff in a capacity different from that in which the plaintiff sued. *See, e.g., Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 885 (2d Cir. 1981); *Blanchard v. Katz*, 117 F.R.D. 527, 528 (S.D.N.Y. 1987); 3 Moore's Federal Practice § 1390[2][d] (3d ed. 2005). There are recognized exceptions to the rule, for instance "if the plaintiff has sued in a representative capacity but will

benefit individually from any recovery" or "if principles of equity and judicial economy support such a counterclaim." *Blanchard*, 117 F.R.D. at 528.

In the instant matter, the Principal Defendants contend that Banco Central may be sued in a counterclaim because it stands in the shoes of Banco Union and Banco Oriental. (Pr. Def. Mem. - Countercl. at 1). Banco Central contends that it brought this action as the banks' assignee and that Rule 13 bars counterclaims against it in its regulatory capacity. There can be little dispute that the Principal Defendants are counterclaiming against Banco Central in its regulatory capacity. The Principal Defendants' allegations pertain to project financing supported by the United States and a written commitment of over $114 million to CQZ Humanitarian Foundation (later PHF). Principal Defendants note that "[a]s the highest banking authority in Paraguay, [Banco Central] had power to enter into a commercial or financial transaction, as alleged in the counterclaim." (Pr. Def. Mem. - Countercl. at 1-2). This is a concession that the allegations in the counterclaim are addressed to Banco Central in its individual capacity as a regulator.

The next issue concerns the capacity in which Banco Central commenced the action. According to the amended complaint: "The Central Bank of Paraguay, acting as the highest banking authority in Paraguay and on behalf and as assignee of Banco Union and Banco Oriental, brings this action to recover the diverted funds." (Am. Compl. ¶ 1). The language elsewhere in the amended complaint is similar (*See, e.g.*, *id.* ¶¶ 6, 35). Banco Central's characterization of itself as the "highest banking authority in Paraguay" is merely a descriptive phrase that does not refer to

the capacity under which it brought suit. As the amended complaint repeatedly makes clear, Banco Central's authority to commence this action derives from its representative capacity as the assignee of Banco Union and Banco Oriental, not from its individual regulatory capacity.

The Court concludes that Banco Central commenced this action in its representative capacity and that Principal Defendants have counterclaimed against Banco Central in its individual regulatory capacity. Accordingly, even if the Court assumes the truth of the allegations in the counterclaim, dismissal is warranted under the Rule 13 "opposing party" requirement. The parties have not addressed the exceptions to the general rule noted on page 6, *supra*, but the Court finds them inapplicable in any event. There is no indication that Banco Central will benefit in its individual capacity from a recovery of the diverted funds. Furthermore, judicial economy will not be served by allowing the counterclaim because the Principal Defendants already have filed a third party complaint containing the same allegations as the counterclaim.

Finally, the counterclaim appears to seek a recovery against Banco Union and Banco Oriental, even though the only plaintiff in the action is Banco Central, acting as the assignee of the two banks. The Principal Defendants make no attempt to persuade the Court that the two banks are "opposing parties" for Rule 13 purposes and thus vulnerable to a counterclaim. In fact, Principal Defendants note that one of the reasons they filed the third-party action "was to provide assurance that the two small Banks were, in fact, a party to this action." (Prin. Def. Mem. -

Third Party Compl. at 3). The Court therefore finds that Banco Oriental and Banco Union are not opposing parties under Rule 13.

The Court need not address Banco Central's other arguments in support of dismissal. The Principal Defendants have not requested leave to replead the counterclaim under Fed. R. Civ. P. 13(f) and 15(a). Nevertheless, construing the counterclaim in the light most favorable to the Principal Defendants, the Court concludes that leave to replead should be denied as futile. *See Albany Ins. Co. v. Esses*, 831 F.2d 41, 45 (2d Cir. 1985), *abrogated on other grounds*, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989). The counterclaim is dismissed with prejudice.

C. Third Party Complaint

Banco Central argues that the third party complaint fails on Rule 12(b)(6) grounds for various reasons and on Rule 4(m) grounds because the Principal Defendants failed to serve the complaint on Banco Union and Banco Oriental until over two and one-half years after filing it. On the service issue, the Principal Defendants respond that they served a copy of the Complaint on the law firm of Hughes Hubbard & Reed LLP, which represents Banco Central and which subsequently filed the motion to dismiss the third party complaint on behalf of Banco Union and Banco Oriental. The Principal Defendants also claim that the third party summons and complaint "were sent to Paraguay for service on the two smaller Banks individually" but "[t]o date, counsel . . . have not received a proof of service." (Pr. Def. Mem. - Third Party Compl. at 2). The Principal Defendants do not dispute that they waited over two and one-half years

after filing the third party complaint to attempt service of Banco Union and Banco Oriental.

Pursuant to Fed. R. Civ. P. 4(m), "[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court . . . shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." While Rule 4(m) does not apply to service in a foreign country, the plaintiff does not have an unlimited time to effect service. *See Yellowave Corp. v. Mana*, No. 00 Civ. 2267(SAS), 2000 WL 1508249 at *1-2 (S.D.N.Y. Oct. 11, 2000). "[W]here service is in a foreign country, the Court uses a flexible due diligence standard to determine whether service of process was timely." *Travers Tool Co. v. Southern Overseas Express Line, Inc.*, 98 Civ. 8464(RO), 2000 WL 194781 at *1 (S.D.N.Y. Feb. 17, 2000); *see also Montalbano v Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985) (applying the Rule 4(m) 120-day service requirement to service in a foreign country because plaintiff "ha[d] not exactly bent over backward to effect service").

The Court finds that the Principal Defendants have not properly served their third party complaint on Banco Union and Banco Oriental. Although the Principal Defendants note that the third-party summons and complaint were sent to Paraguay for personal service, they offer no explanation for the failure of service. Even under the most lenient standards, the Court concludes that Principal Defendants have not been diligent in attempting service on Banco Union and Banco Oriental. The

failure to effect service of process on Banco Union and Banco Oriental is a defect under Fed. R. Civ. P. 12(b)(5). As the Principal Defendants have not shown good cause for the failure of service, *see* Fed. R. Civ. P. 4(m), the Court dismisses the third party complaint without prejudice.

CONCLUSION

In light of the foregoing, Banco Central's motion to dismiss the Principal Defendant's counterclaim is granted. The counterclaim is dismissed with prejudice. Banco Union and Banco Oriental's motion to dismiss the Principal Defendants' third party complaint is granted. The third party complaint is dismissed without prejudice. The parties are directed to submit revised proposed judgments no later than November 10, 2005. Counsel shall appear at a status conference on November 22, 2005 at 11:00 a.m. in Courtroom 20C of the United States Courthouse, 500 Pearl Street, New York, New York.

SO ORDERED.

Dated: New York, New York
October 31, 2005

/s/John F. Keenan
John F. Keenan
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01CIV9649 (JFK)(FM)

[Filed January 7, 2005]

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of Banco Union S.A.E.C.A. in liquidation and Banco Oriental S.A.I.F.E.C.A. in liquidation,

Plaintiff,

v.

PARAGUAY HUMANITARIAN FOUNDATION, INC. f/k/a CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON and JORGE RALPH GALLO QUINTERO,

Principal Defendants,

and

JOHN W. TULAC,

Nominal Defendant.

Hughes Hubbard & Reed LLP, New York, New York, Daniel H. Weiner, Nicholas Swerdloff, for Plaintiff, of counsel.

Cubitt & Cubitt, Bad Axe, Michigan, H. Dale Cubitt, for Principal Defendants, of counsel.

John W. Tulac (in propria persona), Claremont, California, for Nominal Defendant.

OPINION

KEENAN, J.

This dispute involves the diversion of $16 million from Banco Union S.A.E.C.A. ("Banco Union") and Banco Oriental S.A.I.F.E.C.A. ("Banco Oriental"), two Paraguayan banks in liquidation. During March and April of 2000, the funds were transferred to trust accounts maintained by Nominal Defendant John W. Tulac, Esq. ("Tulac") at Citibank in New York. Thereafter, $14 million of the $16 million was transferred to Citibank accounts maintained by Principal Defendant Paraguay Humanitarian Foundation ("PHF"), and over $1 million of the $16 million to other accounts maintained or controlled by Principal Defendants Avijos, Inc. ("Avijos"), Jose M. Avila ("Avila"), CQZ Holding Corp. ("CQZ Holding") and Nominal Defendant Tulac.

On November 1, 2001, Plaintiff Banco Central de Paraguay ("Banco Central"), claiming to be the assignee of the two liquidated banks, commenced this action to recover the $16 million. Banco Central alleges conversion and constructive trust claims against all defendants, and a conspiracy claim against

the principal defendants. On September 13, 2002, the principal defendants filed their answer, affirmative defenses, counterclaim and a now-discontinued third-party complaint against Citibank. Tulac simultaneously filed his answer and interpleader counterclaim. Upon leave of Magistrate Judge Maas, Banco Central filed an amended complaint adding principal defendants Ronald L. Wolfson ("Wolfson") and Jorge Ralph Gallo Quintero ("Quintero") on July 10, 2003. Principal Defendants have filed an answer to the amended complaint and amended affirmative defenses.

Four motions are now before the Court. Banco Central moves for summary judgment on Count One of its amended complaint, which alleges conversion of the $16 million against all defendants. The principal defendants move for summary judgment dismissing Banco Central's claims and awarding costs and attorney's fees. Tulac moves for judgment on the pleadings, or, alternatively, summary judgment, for discharge under the interpleader and dismissal of Banco Central's claims against him.

Background

Banco Central is the highest banking authority in Paraguay and has been characterized by one of its directors as "the Paraguyan equivalent of the Federal Reserve Bank." (Weiner Affid., Exh. Q, ¶ 3). Under Paraguayan law, one of Banco Central's duties is to supervise the liquidation of failed Paraguayan banks through the Superintendent of Banks of Paraguay ("Superintendent"). (*Id.*). The Superintendent appoints the liquidators and supervises the liquidation while reporting back to Banco Central. (*Id.*). There is some

dispute among the parties concerning Banco Central's role in this process. Banco Central claims that it supervises the liquidation through the Superintendent. (Pl. Rule 56.1 Stmt. in Support of Motion ¶¶ 1-2). Nominal defendant Tulac does not dispute the substance of this statement. (Tulac Resp. to Pl. Rule 56 .1 Stmt. ¶ 1). Principal defendants, however, claim that Banco Central is not the Federal Reserve equivalent and that the superintendent has the "full authority" over the liquidated banks. (Def. Ans. To Pl. Rule 56.1 Stmt. ¶¶ 1-2).

In 1998, Banco Central placed Banco Union and Banco Oriental in liquidation. In March 2000, the liquidators of the two banks, presumably appointed by the Superintendent, appointed Juan Fernando Rodriguez Leith ("Rodriguez Leith") power of attorney of Banco Union and Ramon Alberto Guillen Ortiz ("Guillen Ortiz") power of attorney of Banco Oriental. (Cubitt Affd., Exh. B & C). The duration of these appointments was until the termination of a so-called "Reserved Funds Investment Program," or until specified dates in April 2001, whichever occurred first. (Weiner Affd., Exh. Z). At some point, presumably before March 2000, Rodriguez Leith signed a pre-agreement to form a joint venture between the "CQZ Project Manager" and the "D.F.M. Foundation" for work on a "project management plan in Paraguay" and other South and Central American countries. (Cubitt Affd., Exh. F). This pre-agreement was signed by Rodriguez Leith, defendant Quintero (a director and officer of defendant CQZ Holding Corp.), defendant Avila (a director and officer of defendant Avijos), and Julio Gonzalez Ugarte ("Gonzalez Ugarte"). Gonzalez Ugarte was a member of the Banco Central board of directors.

On March 13, 2000, Rodriguez Leith, acting on behalf of both banks, signed a letter of intent directed to Quintero referencing the placement of the $16 million in a Paraguayan humanitarian project. (Weiner Affd., Exh. G).[1] The next day, Rodriguez Leith and Quintero apparently entered into a "Joint Venture" referencing the $16 million placement. (*Id.* at Exh. H).[2] This Joint Venture provides that "in the event that the investment plan is not carried out, instruments deposited in the form of cash and/or demand draft shall be reimbursed without suffering damage or loss of value for any reason whatsoever."(*Id.* ¶ 5).

Soon after the execution of the letter of intent and Joint Venture, the transfers of funds at issue in this dispute occurred. On March 17, 2000, $2 million was transferred from Banco Union to a Citibank trust account in the name of "CQZ Holding Project Trust." ("CQZ Trust Account"). On April 11, 2000, $6.1 million was transferred from Banco Union to another Citibank trust account maintained by nominal defendant Tulac ("Trust Account"). The same day, $7.9 million was transferred from Banco Oriental to the Trust Account. Later in the year, $14 million was transferred from the Trust Account to accounts maintained by PHF at

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[1] According to the principal defendants, Guillen Ortiz transferred authority to act on behalf of Banco Union to Rodriguez Leith. Defendants submit a document that appears to memorialize the transfer, but the document is in Spanish with no translation. (Cubitt Affd., Exh. C)

[2] In the copy of the Joint Venture submitted to the Court, Quintero's signature does not appear above his signature line. (Weiner Affd., Exh. H).

Citibank. Over $1 million was transferred from the CQZ Trust Account to other accounts maintained or controlled by Avijos, Avila (the president of Avijos and secretary of PHF), CQZ Holding and Nominal Defendant Tulac. (Pl. Rule 56.1 Stmt. in Support of Motion ¶ 3).

On June 28, 2000, Rodriguez Leith sent a "Donation Letter" addressed to "CQZ Humanitarian Foundation" (the former name of defendant PHF), which the letter defined as "a United States charitable organization formed to fund humanitarian projects in Paraguay and possibly other South American and Central American nations." (Cubitt Affd., Exh. G). Rodriguez Leith extended a "contribution" of $4 million and a "no-interest" loan of $10 million to the CQZ Humanitarian Foundation for feasibility studies, a proposed hospital project and infrastructure development in Paraguay. (*Id.*). On June 29, 2000, Rodriguez Leith and the CQZ Humanitarian Foundation (PHF) executed the $10 million loan agreement. (*Id.*). It appears the transfer of $14 million of the $16 million from the Trust Account to the Citibank accounts maintained by PHF occurred on the same day as the execution of the loan agreement. (*Id.*, Amended Cmplt. ¶ 22). On October 19, 2000, Rodriguez Leith wrote PHF and informed the directors that the parties responsible for the $10 million loan wished to cancel the note and contribute the money to PHF. (Cubitt Affd., Exh. I)

Also occurring in 2000 was the issuance of two checks by defendant Avijos (Avila's company). (Weiner Affd., Exh. J-K). The first, for $2 million, was dated March 13, 2000 and made payable to Banco Union. This check was dated on the same day that Quintero

and Rodriguez Leith signed the letter of intent and four days before the $2 million transfer from Banco Union. The second check, for $14 million, was dated October 19, 2000 and made payable to Rodriguez Leith. Avijos's account did not, and still does not, have sufficient funds to cover these checks. (Weiner Affd., Exh. L). Defendants claim that the giving of a check (presumably even those that bounce as high as a Baltimore chop) in South America and elsewhere signifies the giving of a guaranty, even though "this is not the way we do things in the U.S." (Def. Ans. to Pl. 56.1 Stmt. ¶ 4).

In January 2001, the Paraguayan press reported that $16 million was missing from Banco Union and Banco Oriental. Soon thereafter, the liquidators of the banks were replaced. Plaintiffs allege that Avila, working in concert with Ugarte, then concocted phony guarantees issued by ABN-AMRO Bank ("ABN") in favor of Banco Union and Banco Oriental. Defendants emphasize that the phony ABN guarantees actually were provided by Banco Central. (Def. Reply Mem. in Support at 3). In their depositions, both Avila and Tulac testified that Ugarte appeared to be the brains behind the guarantees. (Weiner Affd., Exh. A at 131-46; Exh. D at 353-55). Avijos (Avila's company) sent contracts to the new liquidators pursuant to which Avijos would purchase the guarantees from Banco Union and Banco Oriental, thereby providing an avenue for returning the $16 million. It appears that Avila, on behalf of Avijos, entered into the contracts with the liquidators on March 16, 2001. (Cubitt Affd., Exh. J, K). Principal defendants submitted these contracts as part of their opposition papers to Banco Central's summary judgment motions, but failed to submit English translations of the documents.

On April 13, 2001, Tulac sent a letter to the new liquidators in which he informed them that "[p]ursuant to a written agreement between each bank and Avijos, Inc., the banks were guaranteed repayment of a liquidated amount, including principal and all accrued interest." (Weiner Affd., Exh. N). Tulac stated that he was "instructed to settle these two contracts" and that once the banks were paid in full, they would "no longer be a part of the project development." (*Id.*). On April 27, 2001, Tulac wrote to Citibank in Paraguay to ask for information necessary to send payments to Banco Union and Banco Oriental "in settlement of their contracts with Avijos." (*Id.*, Exh. P.). On May 1, 2001, the Banco Union liquidator acknowledged receipt of an April 30, 2001 letter from Tulac that discussed "the probable sending of the funds that were transferred to [Tulac's] account at Citibank." (*Id.*, Exh. O).[3] The Banco Union liquidator requested an exact date for the transfer. (*Id.*). The transfer was never made.

On September 10, 2001, in separate documents, Banco Union and Banco Oriental assigned all their rights and claims in connection with the diverted funds to Banco Central. (Weiner Affd., Exh. R). Defendants claim that these assignments are invalid because they were not notarized in accordance with Paraguayan law. (Def. Mem. in Support at 6-7). On November 1, 2001, Banco Central commenced this action. On November 15, 2001, the Court entered an order of attachment of the nearly $14.1 million in the Citibank trust accounts. These funds remain frozen pursuant to the Court's order.

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[3] This April 30, 2001 letter does not appear in the record.

In November 2001, new liquidators were appointed. In January 2004, these liquidators, on behalf of Banco Union and Banco Oriental, executed ratifications of the assignments to Banco Central and submitted declarations to the Court fully supporting the prosecution of this action by Banco Central. (Swerdloff Affd., Exh. A-B).

Discussion

I. Legal Standards

Banco Central and the principal defendants have submitted motions for summary judgment. Tulac has submitted alternative motions for judgment on the pleadings or summary judgment. The latter motion includes a declaration by Tulac and two exhibits not attached to, or incorporated in, the pleadings. In his reply papers, Tulac refers to his declaration and to the exhibits in support of contentions appearing in the Rule 12(c) motion (Tulac's Reply Brief, dated Feb. 19, 2004, at 3-4). Because Tulac has presented, and relied upon, material outside the pleadings, the Court will treat his alternative motions as one motion for summary judgment under Rule 56. *See Sira v. Morton*, 380 F.3d 57, 66 (2d Cir. 2004).

The Court may grant summary judgment only if the moving party is entitled to judgment as a matter of law because there is no genuine dispute as to any material fact. *See Silver v. City Univ. of New York*, 947 F.2d 1021, 1022 (2d Cir. 1991); *Montana v. First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 103 (2d Cir. 1989); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986). The role of the Court on such a motion "is not to resolve disputed issues of fact but to assess whether

there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight,* 804 F.2d at 11; *see also First Fed. Sav. & Loan Ass'n,* 869 F.2d at 103 (stating that to resolve a summary judgment motion properly, a court must conclude that there are no genuine issues of material fact, and that all inferences must be drawn in favor of the non-moving party).

The movant bears the initial burden of informing the court of the basis for its motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions to file, together with affidavits, if any," that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). If the movant meets this initial burden, the party opposing the motion must then demonstrate that there exists a genuine dispute as to the material facts. *See id.; Silver,* 947 F.2d at 1022.

The opposing party may not solely rely on its pleadings, on conclusory factual allegations, or on conjecture as to the facts that discovery might disclose. *See Gray v. Town of Darien,* 927 F.2d 69, 74 (2d Cir. 1991). Rather, the opposing party must present specific evidence supporting its contention that there is a genuine material issue of fact. *See Celotex Corp.,* 477 U.S. at 324; *Twin Labs. Inc. v. Weider Health & Fitness,* 900 F.2d 566, 568 (2d Cir. 1990). To show such a "genuine dispute," the opposing party must come forward with enough evidence to allow a reasonable jury to return a verdict in its favor. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986); *Cinema North Corp. v. Plaza at Latham Assocs.,* 867 F.2d 135, 138 (2d Cir. 1989). If

"the party opposing summary judgment propounds a reasonable conflicting interpretation of a material disputed fact," then summary judgment must be denied. *Schering Corp. v. Home Insur. Co.*, 712 F.2d 4, 9-10 (2d Cir. 1983).

II. Banco Central's Motion

Banco Central has moved for summary judgment on its conversion claim, which is Count One of the Amended Complaint. In order to state a cause of action for conversion, "a plaintiff must establish legal ownership of a specific identifiable piece of property and the defendant's exercise of dominion over or interference with the property in defiance of the plaintiff's rights." *Di Siena v. Di Siena*, 266 A.D.2d 673, 674, 698 N.Y.S.2d 93, 95 (3d Dep't 1999)." Wrongful intent is unnecessary. All that the owner need show is that he has been deprived of his property by the defendant's unauthorized exercise of dominion and control over it." *Filner v. Shapiro*, 633 F.2d 139, 141-42 (2d Cir. 1980). A limitation is that "[a] cause of action for conversion cannot be predicated on a mere breach of contract." *Fesseha v. TD Waterhouse Investor Services, Inc.*, 305 A.D.2d 268, 269, 761 N.Y.S.2d 22, 24 (1st Dep't 2003).

Banco Central alleges that it has the superior right of possession to the $16 million. Banco Central initiated this lawsuit pursuant to assignments of rights from Banco Union and Banco Oriental on September 10, 2001. The new liquidators ratified these assignments in January 2004. Furthermore, Banco Central contends, defendants have admitted that the liquidated banks were entitled to the return of the money. For example, Avila testified at his deposition:

Q: So they never got their money back because the Paraguay Humanitarian Foundation wants to do this project in Paraguay. Is that what you're telling me?

A: No. We are going to return the whole amount of money with or without the project, in Paraguay.

(Weiner Affd., Exh. A at 129). Quintero also testified to the same effect at his deposition:

Q: So am I correct in understanding that the intention was that the money would be returned to the two Paraguayan banks without the loss of any value?

A: Yes.

...

Q: When you said you wanted him [Tulac] to make settlement arrangements for making settlement with the two banks, did you mean to return the $16,000,000?

A: To set up so we could give them assistance so they can get the $16,000,000 back plus interest.

(*Id.*, Exh. C at 80, 102). Nominal defendant Tulac added another variation on this theme with respect to the funds transferred to a PHF trust account:

Q: So there would be no disbursements for the 14 million

A: There would be no disbursements from there. It was ultimately contemplated the 14 million would be disbursed back.

Q: To Paraguay?

A: To Paraguay.

(*Id.*, Exh. D at 167-68).

Banco Central also alleges that the defendants failed to return the money upon demand, even though the money resided in trust accounts under defendants' control. Consequently, Banco Central argues, summary judgment on its conversion claim is warranted.

The principal defendants attempt to stave off summary judgment with several arguments that attempt to generate a dispute of fact. First the defendants attack the assignments, both here and in their own motion for summary judgment, by challenging their validity under Paraguayan law. (Pr. Def. Mem. in Support at 5; Pr. Def. Rep. Mem. at 4; Pr. Def. Mem. in Opp. at 4). Defendants cite a June 2002 emailed "Memorando" (in Spanish) from Alfredo Kronawetter, who is purportedly an attorney in Paraguay. (Pr. Def. Mem. in Support at Exh. E). This memorandum is accompanied by an unsigned, undated, and uncertified English translation. First, the Memorando is hearsay that would be inadmissible at trial. Second, even a ninth-grader in the first month of Spanish 101 can see that the translation bears no resemblance to any portion of the Memorando. The translation discusses the notarization of certain documents. The Memorando appears to discuss the jurisdiction of the Paraguayan courts, and who has the ultimate authority to act on behalf of banks in liquidation. The Court therefore disregards this

evidence and rejects principal defendants' argument that the assignment were invalid.[4]

Principal defendants also argue that "the liquidators of the two banks, the power of attorney for the two banks, the president and director and several other directors of [Banco Central] were all involved from the beginning." (Pr. Def. Mem. in Opp. at 2). While this statement is highly general, it is clear from the submitted papers that Banco Union power of attorney Rodriguez Leith, purportedly acting on behalf of both banks, was highly involved in the transfers. Gonzalez Ugarte, a director on Banco Central's board, also had some involvement, judging from his execution of the Pre-Agreement.

Even if the Court gives the non-movant defendants the benefit of the doubt and assumes *arguendo* that their initial possession of the $16,000,000 was proper, it is hornbook law that when the dispossessed party makes a demand on his goods, an absolute and unqualified refusal to surrender the goods constitutes conversion. *Prosser and Keeton on the Law of Torts* 99 (5th ed. 1984); *see, e.g., Schwartz v. Capital Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993) ("Where the original possession is lawful, a conversion does not occur until defendant refuses to return the property after demand or until he sooner disposes of the property."). Banco Central's action for conversion gives notice of an adverse claim to the $16,000,000 and

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[4] Principal Defendants sent a declaration by Mr. Kronawetter to the Court on May 24, 2004 (this time with a proper English translation) that makes the same statement with regard to notarization. This declaration was submitted over four months after the close of briefing and will not be considered.

fulfills the demand requirement. *See Chemical Bank v. Soc'y Brand Indus., Inc.*, 624 F. Supp. 979, 983 (S.D.N.Y. 1985). Defendants' general assertions concerning the involvement of Ugarte and the liquidators do not change this analysis.

Principal Defendants next contend that Avijos has assumed responsibility for the funds and owes Banco Central the $16,000,000. Defendants contend that Avijos assumed this responsibility by way of fraudulent checks for $2,000,000 and $14,000,000. Defendants' (unsubstantiated) argument bears repeating: "Although this is not the way we do things in the U.S., it is common in South America and elsewhere in the world to give your check as your guarantee." (Pr. Def. Mem. in Opp. at 2). This argument is far-fetched in the extreme.

In the next sentence of their brief, Principal defendants contend that Rodriguez Leith, on behalf of the banks, "gifted" the $16,000,000 to PHF. (*Id.* at 2-3). Principal defendants refer to Rodriguez Leith's $4,000,000 contribution and $10,000,000 loan that later became a contribution itself. (Cubitt Affd. at Exh. G, I). This argument is also without merit. A gift requires donative intent. *Muserlian v. C.I.R.*, 932 F.2d 109, 113 (2d Cir. 1991). Defendants conceded repeatedly on deposition that the banks were entitled to the return of the $16,000,000. Furthermore, the Joint Venture between Rodriguez Leith (on behalf of the banks) and Quintero (on behalf of CQZ Holding Trust) makes clear that the money must be "reimbursed" to the banks if the investment plan was not carried out. (Weiner Affd., Exh. H). There was no "gift."

The Court has considered the Principal defendants' remaining arguments and finds them unsubstantiated and therefore without merit. In fact, Principal Defendants' papers contain very few citations to the record. Far more often than not, Principal defendants merely make conclusory "pound the table" statements with no evidentiary support whatsoever. Plaintiffs' motion for summary judgment on Count I of its Amended Complaint is therefore granted with respect to the Principal Defendants.

Nominal defendant Tulac, who held the trust accounts at Citibank that housed the $16,000,000, fares better than his co-defendants because Banco Central's motion papers in support of summary judgment barely discuss his role. Banco Central merely rebuts his arguments against conversion in their reply papers. This is not enough for summary judgment with respect to him. Tulac has produced the Trust Agreements that state that he "has no knowledge of or participation in any investment program arranged by [CQZ Holding Corp.]." His receipt of monies into the trust account was pursuant to this agreement. While there is no doubt that Tulac wrote letters in April 2001 purporting to arrange for a reimbursement of funds that never took place, Banco Central points to no clear evidence in its moving papers that Tulac acted outside the scope of the trust agreements. The motion for summary judgment on Count I of the Amended Complaint is denied with respect to Tulac.

III. Principal Defendants' Motion

The principal defendants have moved for summary judgment on all three counts on Banco Central's Amended Complaint. Obviously, the motion on Count I is denied because the Court has already granted summary judgment to Banco Central as against the principal defendants on this Count. The motions on Counts II and III are also denied.

The principal defendants' motion is fatally flawed by its noncompliance with Local Rule 56.1 of this District's Local Civil Rules. According to Rule 56.1(a), "there shall be annexed to the notice of motion a separate, short and concise statement, *in numbered paragraphs,* of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion." The principal defendants submitted no statement at all until the reply papers stage-a clear violation of the Rule. The Court will overlook this failing because of its broad discretion to excuse violations of the local rules. *See Wight v. Bankamerica Corp.*, 219 F.3d 79, 85 (2d Cir. 2000). On the other hand, the submitted statement contains a flaw that the Court *cannot* overlook.

Rule 56.1(d) provides that "[e]ach statement *by the movant or opponent pursuant to Rule 56.1(a) and (b)...* must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)." As previously discussed, Principal Defendant's papers are notable for their lack of citations. Principal Defendant's Rule 56.1 statement contains only three cited sentences in fifteen

paragraphs-and the citations are to one declaration by defendant Avila. This six-paragraph declaration states that Avila attended a meeting with Ugarte, Rodriguez Leith, and Guillen Ortiz in 2000, that he gave the two checks "in accordance with South American customs" and that Avijos has entered into a contract with Banco Union and Banco Oriental stipulating that jurisdiction over this matter was in Paraguay.

The jurisdiction issue appears in Principal Defendants' papers from time to time, but it is a nonstarter. This is a tort action, not a contract action. While it is true that an action in conversion will not lie for a mere breach of contract, the plaintiff may bring a conversion claim when the breach "result[s] in some 'wrong' that is separately actionable." *Wechsler v. Hunt Health Systs., Ltd.*, 330 F.Supp.2d 383, 431-432 (S.D.N.Y. 2004). Banco Central has chosen to sue in tort, and a contract with Banco Union and Banco Oriental that provides for jurisdiction in Paraguay does not govern Banco Central's conversion claims. Principal Defendants indeed submitted these contracts as exhibits to their opposition papers. Unfortunately, the contracts are in Spanish, and Principal Defendants neglected to provide translations.

The point of Local Rules such as Rule 56.1(d) is to compel the movant to "specif[y] the material facts and direct[ ] the district judge and the opponent of summary judgment to the parts of the record which the movant believes support his statement." *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150-51 (D.C. Cir. 1996). The Court's role is not to wander aimlessly through the record in search of evidence that substantiates the allegations in the Rule 56.1 statement. When the movant is

responsible for forcing the Court into this role, the Court is completely justified in denying the motion in its entirety. Principal defendants' motion is denied.

IV. Tulac's Motion for Summary Judgment

Tulac's Rule 56.1 statement, which is titled "Statement of Undisputed Facts"-while properly submitted with the initial moving papers-suffers from the same debilitating failing as the principal defendant's statement. With the exception of the fourth paragraph, none of the eight paragraphs in the statement contain citations to the record. The only citations are to letters issued by Citibank in May 2002 that terminated Tulac's accounts and instructed him to conduct his banking business elsewhere. (Tulac Notice of Motion, Exh. 1-2). Banco Central, by contrast, makes a number (cited) assertions of fact in its Rule 56.1 Statement in Opposition. These facts at least permit an inference that Tulac had some role in the diversion. Tulac's motion for summary judgment, which incorporates his motion for judgment on the pleadings, is denied.

V. Conclusion

Banco Central's motion for summary judgment on Count I of its Amended Complaint is granted as to the principal defendants and denied as to nominal defendant Tulac. The remaining motions are denied.

Banco Central is directed to settle a judgment consistent with this decision on seven days' notice to the principal defendants. If the parties cannot agree on a judgment, they shall submit proposed judgments to the Court no later than February 1, 2005.

The parties are directed to appear at a conference on March 8, 2005 at 9:45 a.m. in order to discuss any issues remaining in this action.

SO ORDERED.

APPENDIX G

Federal Rules of Civil Procedure
Rule 4. Summons

(a) Contents; Amendments.

(1) Contents.

A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) Amendments.

The court may permit a summons to be amended.

(b) Issuance.

On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

(c) Service.

(1) In General.

A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) By Whom.

Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed.

At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

(1) Requesting a Waiver.

An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive.

If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver.

A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver.

When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived.

Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States.

Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country.

Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person.

A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association.

Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by

appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) United States.

To serve the United States, a party must:

(A)

(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity.

To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually.

To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) Extending Time.

The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) Foreign State.

A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) In General.

Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction.

For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) Affidavit Required.

Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) Service Outside the United States.

Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) Validity of Service; Amending Proof. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service.

If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(n) Asserting Jurisdiction over Property or Assets.

(1) Federal Law.

The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) State Law.

On a showing that personal jurisdiction over a defendant cannot be obtained in the district where

the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

SUPREME COURT, U.S.
FILED
MAY 28 2010
OFFICE OF THE CLERK

No. 09-1412

IN THE

Supreme Court of the United States

PARAGUAY HUMANITARIAN FOUNDATION, INC.,
FKA CQZ HUMANITARIAN FOUNDATION, INC., *ET AL.*,

Petitioners,

v.

BANCO CENTRAL DEL PARAGUAY, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRUIT

BRIEF IN OPPOSITION

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May 28, 2010

QUESTION PRESENTED

Petitioners – defendants below – filed a third-party complaint against two banks located in Paraguay. They never served the third-party complaint on the banks. Did the district court abuse its discretion in dismissing the third-party complaint without prejudice, pursuant to Fed. R. Civ. P. 12(b)(5) and 4(m), where (1) Petitioners took no steps to attempt to serve the third-party complaint in Paraguay for two and a half years after filing it, and (2) Petitioners never effected service and never explained why they could not?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents state that none of them has a parent corporation and no publicly held corporation owns ten percent or more of their stock.

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Respondents submit this opposition to the petition for a writ of certiorari.

STATEMENT

1. Working with the liquidators of two Paraguayan banks and others in Paraguay (some of whom have now been criminally convicted), Petitioners converted $16 million of the banks' funds using purported "agreements" with the banks and other documents – including forged "guarantees" and fraudulent checks that in the words of the district judge "bounce[d] as high as a Baltimore chop." (*See* Pet. 34a; JA-134-38; JA-175-77; *see also* JA-214; JA-220-21; JA-237-38; JA-295-96.) The money had been illegally transferred out of Paraguay to Petitioners' accounts as part of a scheme involving false "high yield" investment plans and non-existent "humanitarian" infrastructure projects supposedly sponsored by the U.S. Government. (*See* JA-152; JA-167; *see also* JA-143-47; JA-201-02; JA-206-07.) As Petitioners later admitted and U.S. Government officials confirmed, the project financing programs claimed by Petitioners never existed. (*See* JA-186; JA-209-10; JA-270-74; JA-300; JA-544-45.)

2. On September 1, 2001, Respondent Banco Central del Paraguay ("Central Bank"), pursuant to its legal authority as supervisor of failed banks, obtained an assignment from the two Paraguayan banks in liquidation of all their rights and claims relating to the diverted funds. (JA-263; JA-265-68.) On November 1, 2001, the Central

Bank, in its capacity as the banks' assignee, commenced this action against Petitioners to recover the funds. (JA-1.) In response, Petitioners filed an answer, a counterclaim against the Central Bank, and a third-party complaint against the Paraguayan banks in liquidation, alleging breach of contract and tortious interference, and seeking compensatory damages as well as "a humongous and bodacious amount of punitive damages." (JA-98; Pet. 20a.)

3. On January 7, 2005, the district court granted the Central Bank's motion for summary judgment, finding that Petitioners' arguments had no "evidentiary support whatsoever," and that Petitioners had converted the $16 million as a matter of law because the Central Bank indisputably had a superior right to the funds and Petitioners indisputably had failed to return them. (Pet. 38a-43a.) The court of appeals affirmed, similarly holding that "the sixteen million dollars...was unlawfully transferred out of Paraguay." (Pet. 5a.)

On October 31, 2005, the district court dismissed the counterclaim with prejudice on legal grounds. The court also dismissed without prejudice Petitioners' third-party complaint. The district court found that Petitioners' failure to serve the banks in Paraguay was a defect in service under Fed. R. Civ. P. 12(b)(5), and that Petitioners had "not shown good cause for the fail[u]re of service, *see* Fed. R. Civ. P. 4(m)." (Pet. 27a.) The court of appeals affirmed, holding that the district court had not "abused its discretion here where defendants waited two and a

half years to attempt service, never effected service, and did not explain why they had not been able to effect service." (Pet. 7a.)

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioners' "question presented" misstates the real question in this case. The issue here is not, as Petitioners portray it, whether Rule 4(m) authorizes dismissal "if a litigant attempts service in a foreign country after 120 days." The real question presented is whether it is within the sound discretion of a district court to dismiss a third-party complaint *without prejudice* where: Petitioners did not even *attempt* to serve the third-party complaint in Paraguay for two and a half years after filing it, and never explained why; Petitioners then purportedly "sent" the third-party complaint "to Paraguay for service" (Pet. 25a), but did not explain what steps they took to try to effect service; and Petitioners never effected service and never explained why.

2. The decision below is consistent with the case law throughout the circuits. Petitioners' assertion of a "deep and broad" split of authority regarding the foreign country exception in Rule 4(m) (Pet. 10) vastly overstates any differences in the cases. To the contrary, there is universal agreement among the courts of appeals that have considered the issue that the requirement of service within 120 days after filing under Rule 4(m) does *not* apply to service

in a foreign country. The courts of appeals that have addressed the issue also agree, however, that there must be *some* time limit for service in foreign countries, particularly where a plaintiff cannot show any effort to effect service within a reasonable period. *See, e.g.*, *USHA (India), Ltd. v. Honeywell Int'l, Inc.*, 421 F.3d 129, 134 (2d Cir. 2005) (dismissing under Rule 4(m) where "plaintiff did not attempt to serve the defendant in the foreign country"); *Nylok Corp. v. Fastener World Inc.*, 396 F.3d 805, 807 (7th Cir. 2005) ("the amount of time allowed for foreign service is not unlimited").

Petitioners' contention that the Ninth Circuit conflicts with the Second Circuit is simply wrong. Petitioners assert that in *Lucas v. Natoli*, 936 F.2d 432 (9th Cir. 1991), the Ninth Circuit rejected a supposed rule in the Second Circuit that service in a foreign country must have been attempted within 120 days. (Pet. 12-13.) Petitioners mis read both *Lucas* and the Second Circuit decisions. As the Ninth Circuit recognized, the Second Circuit's decision in *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985), did not turn on whether service in a foreign country was attempted within 120 days, but rather held that dismissal was appropriate "because no service had been effected anywhere at the time of the order of dismissal." *Lucas*, 936 F.2d at 433. Thus, as *Lucas* understood, "the question whether the 120-day requirement of Rule 4([m]) applies to service in a foreign country was irrelevant" to the holding in *Montalbano*. *Id.* at

433; *see also Montalbano*, 766 F.2d at 740. Likewise, the Second Circuit's decision below does not turn on Petitioners' failure to attempt service within 120 days, but on their failure to do so in two and a half years and the other circumstances described above.

Petitioners claim that a handful of district courts have interpreted *Lucas* as finding that there is no time limit on service in a foreign country. But *Lucas* at best is silent on the question whether a district court has discretion to dismiss if a plaintiff does not attempt to serve in a foreign country within some reasonable time beyond 120 days – and likely implies that it does. *See, e.g.*, *Baja Developments LLC v. TSD Loreto Partners*, No. 09-cv-756, 2009 WL 2762050, at *1 (D. Ariz. Aug. 28, 2009) (citing *Lucas* as controlling and stating "Plaintiff has not cited, nor has the Court found, any authority stating that a district court is precluded from setting a reasonable time limit for service in a foreign country to properly manage a civil case."). Ten of the eleven district court cases Petitioners cite on this point are to the same effect. (Pet. 15 n.8.)[1]

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[1] Only *Pa. Orthopedic Ass'n v. Mercedes-Benz A.G.*, 160 F.R.D. 58, 60-61 (E.D. Pa. 1995), actually holds, based on that court's interpretation of *Lucas*, that plaintiffs have an unlimited amount of time for foreign service.

The district courts virtually universally acknowledge discretion to dismiss in appropriate circumstances and in fact employ a single standard that considers the totality of the circumstances specific to the case to determine "the reasonableness and diligence of plaintiff's efforts to serve." *See In re Crysen/Montenay Energy Co.*, 166 B.R. 546, 553 (S.D.N.Y. 1994); *see also, e.g.*, *Nabulsi v. Nahyan*, No. H-06-cv-2683, 2008 WL 1924235, at *5-*6 (S.D. Tex. Apr. 29, 2008); *Teta v. Li*, No. 02-cv-2183, 2005 WL 1668093, at *3-*4 (D. Conn. July 15, 2005). Indeed, this is the same test that the district courts generally used to determine whether dismissal for failure to effect timely service was appropriate when Rule 4 was silent as to the timing of service, *i.e.*, before Congress amended Rule 4 in 1983 to impose the 120-day time limit on domestic service. *See Montalbano*, 766 F.2d at 740 n.6 ("before 1983 there was no set time limit for summons service after the filing of the complaint; instead, a kind of due diligence standard was flexibly applied") (citing Siegel, Practice Commentaries U.S.C.A. Rule 4, at 54 (West Supp. 1985)). Although Rule 4 now has an express timing rule for domestic service, the Rule remains silent as to the timing of foreign service, and there is no reason to believe that the pre-existing test no longer applies to foreign service.

3. Petitioners suggest that dismissal under Rule 41(b) is the only available remedy for district courts seeking to "move a case along" for failure to effect foreign service. (Pet. 20.) But district courts

generally apply the same flexible due diligence standard under Rule 41(b) as they do under Rules 12(b)(5) and 4(m). *See, e.g., In re Southold Development Corp.*, 148 B.R. 726, 730 (E.D.N.Y. 1992) (applying "flexible due diligence" standard under Rule 41(b) where plaintiff attempted service in a foreign country but had not effected service after eleven months). The principal difference is that dismissal under Rule 41(b) is *with prejudice* unless the court affirmatively orders otherwise.

4. The petition acknowledges that the vast majority of dismissals without prejudice for failure of service are inconsequential because they are "remedied most easily simply by re-filing the complaint." (Pet. 16.) And, in most cases, plaintiffs do simply re-file and then act more diligently to effect service. (*Id.*) This purported issue, in other words, affects a tiny fraction of cases – the cases where plaintiffs have failed for such a lengthy period to act diligently to attempt service in a foreign country that a legal impediment precludes re-filing. Protecting those few parties from their own lack of diligence is not an important issue that requires this Court's attention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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May 28, 2010

Supreme Court, U.S.
FILED
JUN 7 - 2010
OFFICE OF THE CLERK

No. 09-1412

In the Supreme Court of the United States

PARAGUAY HUMANITARIAN FOUNDATION, INC., F/K/A CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON, and JORGE RALPH GALLO QUINTERO,

Petitioners,

v.

BANCO CENTRAL DEL PARAGUAY, ON BEHALF AND AS ASSIGNEE OF BANCO UNION S.A.E.C.A. AND BANCO ORIENTAL S.A.I.F.E.C.A., BANCO UNION S.A.E.C.A., and BANCO ORIENTAL S.A.I.F.E.C.A.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A. The Circuits Disagree Sharply on the Central Question in this Case

Respondents seek to deflect attention from the significant inter-circuit conflicts identified by Petitioners by focusing on ancillary questions that merely point out the obvious. It is irrelevant to the petition that there may be "universal agreement" that the 120-day time limit in Rule 4(m) "does not apply to service in a foreign country." Opp. 3-4 (emphasis omitted). This purported "agreement" is simply a restatement of the plain language of Rule 4(m). It does not reflect any agreement on the separate and important issues presented by the petition relevant to the case at hand.

For instance, the courts of appeals are in clear disagreement over whether service in a foreign country must be attempted within 120 days for the foreign country exception in Rule 4(m) to apply in the first place. The Ninth Circuit in *Lucas v. Natoli*, 936 F.2d 432 (9th Cir. 1991), flatly rejected the "argu[ment] that service in a foreign country must at least be attempted within 120 days." *Id.* at 433. But the Second Circuit below applied its contrary rule that the foreign country exception does not apply "where a party d[oes] not attempt service within the 120-day limit . . . ." Pet. App. 7a (citing *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985)). The Seventh Circuit has also disagreed with the Ninth Circuit on this specific point, stating that dismissal for untimely service under Rule 4(m) may be proper if a plaintiff "ma[kes] no attempt to begin the process of foreign

service within 120 days." *Nylok Corp. v. Fastener World Inc.*, 396 F.3d 805, 807 (7th Cir. 2005).

Respondents attempt to paint the decision of the court of appeals as based not on "Petitioners' failure to attempt service within 120 days, but on their failure to do so in two and a half years . . . ." Opp. 5. But the fact remains that the court of appeals here refused to apply Rule 4(m)'s foreign country exception based on the timing of Petitioners' attempted service of the third-party complaint. In contrast, the Ninth Circuit would not have conditioned application of the foreign country exception on the timing of Petitioners' attempted service in a foreign country.

Respondents also tellingly fail to address the split in the courts of appeals over a district court's discretion to dismiss a complaint as untimely on Rule 4(m) grounds where service is in a foreign country. As discussed in the petition, *see* Pet. 11-12, both the Ninth and Seventh Circuits afford district courts no discretion to dismiss a complaint for failure to comply with the 120-day limit in Rule 4(m) when service is in a foreign country, *see Lucas*, 936 F.2d at 432-33 (no review for abuse of discretion); *Nylok*, 396 F.3d at 806-07 (same). But the Second and Third Circuits review a district court's dismissal for untimely service in a foreign country using the far more lenient abuse of

discretion standard.[1] *See* Pet. App. 7a; *Umbenhauer v. Woog*, 969 F.2d 25, 31-32 (3d Cir. 1992).

B. *Lucas* Does Not Grant District Courts Discretion To Dismiss under Rule 4(m) for Untimely Service in a Foreign Country

Respondents overly minimize the circuit conflict here by incorrectly interpreting the Ninth Circuit's decision in *Lucas* to afford district courts "discretion to dismiss if a plaintiff does not attempt to serve in a foreign country within some reasonable time beyond 120 days," Opp. 5, based on their reading of a solitary, unpublished district court case from that circuit. *See Baja Devs. LLC v. TSD Loreto Partners*, No. CV-09-756-PHX-LOA, 2009 WL 2762050 (D. Ariz. Aug. 28, 2009). But even the *Baja* district court did not find in *Lucas* authority to exercise the degree of discretion that Respondents propose. Rather, that court stated only that it had not found "any authority stating that a district court is precluded from setting a reasonable time limit for service in a foreign country to properly manage a civil case" – an entirely separate question. *Baja*, 2009 WL 2762050, at *1.

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[1] Respondents and the Ninth Circuit in *Lucas* correctly note that the Second Circuit's decision in *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985), did not purport to interpret Rule 4(j) – the predecessor to Rule 4(m) – at all. In that case, service was never attempted in a foreign country; rather, service was attempted only on the presumed domestic agent of a foreign corporation. *Id.* at 738, 740. But the Second Circuit below was clear that in its view and under its precedents, a district court has discretion to dismiss for untimely foreign service under Rule 4(m) and that the foreign country exception does not apply "where a party d[oes] not attempt service within the 120-day limit." Pet. App. 7a.

Respondents' interpretation conflates the questions whether a district court has discretion to dismiss for untimely foreign service under Rule 4(m) if a plaintiff fails to show due diligence and whether the district court may, under Rule 41(b) or pursuant to its inherent authority to manage cases, have discretion to set a reasonable time limit for service in a foreign country and subsequently enforce it. Several of the district courts that have recognized that the plain text of Rule 4(m) imposes no time limit for service in a foreign country have nonetheless concluded that they have the authority to set a reasonable time limit for foreign service. *See In re Copper Antitrust Litig.*, No. MDL 1301, 02-C-0707-C, 2003 WL 23200370, at *1 (W.D. Wis. May 30, 2003); *Flock v. Scripto-Tokai Corp.*, No. Civ.A.H-00-3794, 2001 WL 34111630, at *4-6 (S.D. Tex. July 23, 2001); *Kim v. Frank Mohn A/S*, 909 F. Supp. 474\, 479-80 (S.D. Tex. 1995).

Petitioners do not argue that a district court is precluded from setting a reasonable time limit for service in a foreign country pursuant to its inherent authority to manage its cases – as opposed to Rule 4(m). *See, e.g., Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 609 (3d Cir. 1995) ("Although the procedural rules governing federal civil litigation do not explicitly authorize a district court to set time limits for a trial, a district court has inherent power to control cases before it, provided it exercises the power in a manner that is in harmony with the Federal Rules of Civil Procedure." (internal quotation marks omitted) (quoting *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (en banc))). But a district court's authority to impose – and enforce – a reasonable time limit to manage its docket does not include the authority to dismiss a complaint for

untimely service *where no time limit is in effect*. Rule 4(m) clearly exempts service in a foreign country from the 120-day limit applicable to domestic service, and the Rules otherwise impose no diligence requirement specific to service in a foreign country. A district court therefore lacks discretion to dismiss a complaint for untimely foreign service under Rule 4(m) unless it is enforcing a reasonable time limit it has previously imposed or unless it exercises its authority under Rule 41(b) to dismiss for failure to prosecute.

The fact that the district court in *Baja* concluded that *Lucas* was consistent with its authority to impose a reasonable time limit for foreign service does not support the proposition that *Lucas* would allow a district court's dismissal for untimely service in a foreign country based on Rule 4(m) alone, as occurred here. *Cf. O'Rourke Bros. Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 952 (7th Cir. 2000) ("Because the current rule, Rule 4(m), is silent as to sanctions for not serving foreign defendants, perhaps Rule 41(b) . . . is precisely the proper [basis for a dismissal].").

C. The District Courts Are In Conflict

Respondents assert that "[t]en of the eleven district court cases" cited by Petitioners (at Pet. 15 n.8) do not support Petitioners' contention that those courts followed the Ninth Circuit's view that Rule 4(m) imposes no time limit for foreign service and that such foreign service is not subject to a "flexible due diligence" requirement. Opp. 5. In fact, all of those cases support just such a proposition.

All eleven cases agree with the Ninth Circuit that Rule 4(m) imposes no time limit for foreign service,

and *none* imposes a requirement that a plaintiff show "due diligence" or "reasonableness" to avoid dismissal under Rule 4(m).[2] These district court cases all conflict with the numerous district court cases, also cited by Petitioners, that do require a plaintiff to show due diligence or that the time to effect service is reasonable to avoid dismissal. *See* Pet. 13-14 nn.6 & 7.

Moreover, Respondents fail to address the clear conflict in the district courts over whether service in a foreign country must be attempted within 120 days for the foreign country exception to apply. *See* Pet. 15-16 nn.9 & 10.

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[2] *In re Southold Dev. Corp.*, 148 B.R. 726 (E.D.N.Y. 1992), applies a "flexible due diligence" standard under Rule 41(b), not Rule 4(m). *Id.* at 730 (citing Rule 41(b) as the source of a district court's authority to dismiss for failure to effect service in a foreign country). But the district court below did not purport to exercise its discretion to dismiss for failure to prosecute under Rule 41(b), and the court of appeals did not affirm on that ground. In the Second Circuit, the court of appeals would have reviewed a dismissal under Rule 41(b) for whether

> (1) the plaintiff's failure to prosecute caused a delay of significant duration; (2) plaintiff was given notice that further delay would result in dismissal; (3) defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calendar congestion was carefully balanced against plaintiff's right to an opportunity for a day in court; and (5) the trial court adequately assessed the efficacy of lesser sanctions.

United States ex rel. Drake v. Norden Sys., Inc., 375 F.3d 248, 254 (2d Cir. 2004). Neither the district court nor the court of appeals considered the factors relevant to dismissal under Rule 41(b) in this case. And indeed, it is unlikely that proper application of those factors to Petitioners here would have justified dismissal pursuant to this rule.

D. The History of Rule 4(m) Does Not Support Imposition of a "Flexible Due Diligence" Standard

Respondents argue that the flexible due diligence standard adopted by the district court below[3] is available under Rule 4(m), despite the absence of any reference to such a standard in the Rule, because courts purportedly applied that standard when the Rule contained no express time limit prior to the 1983 amendments. *See* Opp. 6. But the history of the Rule does not support Respondents' position.

Rule 4 was amended in 1983 to shift responsibility for service from United States marshals to plaintiffs. *See* Fed. R. Civ. P. 4 advisory committee's note (1993) ("The 1983 revision of Rule 4 relieved the marshals' offices of much of the burden of serving the summons."). According to this Court, prior to 1983, "[m]arshals were expected to effect service expeditiously, and Rule 41(b), providing for dismissal '[f]or failure of the plaintiff to prosecute,' could be

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[3] Only some district courts share this view. Respondents' contention that "district courts virtually universally acknowledge discretion to dismiss . . . and . . . employ a single standard that considers the totality of the circumstances," Opp. 6, is belied by the many cases cited by Petitioners that employ different standards, *see* Pet. 14-15 nn.7-8. Moreover, the cursory citation by a number of district courts to prior district court decisions in support of such a standard is akin to the "drive-by jurisdictional rulings" this Court has stated should receive "no precedential effect." *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (internal quotation marks omitted); *see also Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1251 (2010) (Ginsburg, J., concurring) (dismissing as "drive-by jurisdictional rulings" "well over 200 opinions" characterizing a statute as jurisdictional).

invoked as a check against unreasonable delay." *Henderson v. United States*, 517 U.S. 654, 662 (1996) (quoting Fed. R. Civ. P. 41(b)). Thus, prior to the adoption of the 120-day time limit, dismissal for "unreasonable delay" in service was proper only under Rule 41(b).

Under the 1983 amendments to Rule 4, however, plaintiffs became "responsible for *prompt* service of the summons and a copy of the complaint." Fed. R. Civ. P. 4(a), 96 Stat. 2527 (1983) (superseded 1993) (emphasis added). The subsequent 1993 amendments to the Rule removed the requirement that a plaintiff effect "prompt" service and instead imposed the requirement in effect under the Rule today – that a plaintiff serve the complaint "within the time allowed under subdivision (m)." Fed. R. Civ. P. 4(c)(1); *see* Fed. R. Civ. P. 4(c)(1), 146 F.R.D. 401 (1993).

Thus, Rule 4 today not only expressly relieves plaintiffs from any time limit for foreign service, but it also no longer contains a requirement that a plaintiff "prompt[ly]" serve the complaint; rather, a plaintiff is only required to serve a complaint within the time limit provided by subdivision (m). Where service is in a foreign country "the time allowed under subdivision (m)" is unlimited, though Rule 41(b) may remain "a check against unreasonable delay" as it did prior to 1983. *See Henderson*, 517 U.S. at 662. As the district court below did not purport to exercise its authority under Rule 41(b), however, the district court's decision here cannot be upheld on that ground. *See* Pet. 20.

E. The Question Presented Affects a Large Class of Litigants

Respondents' contention that the question presented by the petition affects only "a tiny fraction of cases" in which parties lack diligence, *see* Opp. 7, ignores the impact the question has on a far larger group of litigants.

Foreign litigants increasingly will find themselves sued in federal courts and are entitled to clarity as to whether there is a time limit for attempted service in a foreign country, whether a plaintiff must act diligently in effecting service in a foreign country, and whether a district court has discretion to dismiss under Rule 4(m) for untimely service in a foreign country or whether the defendant must request that the district court impose a reasonable deadline or dismiss pursuant to Rule 41(b). These procedural rules should not depend on the judicial circuit in which a plaintiff initiates a lawsuit.

Additionally, if, as Petitioners argue, district courts do not have discretion under Rule 4(m) to dismiss a complaint for untimely foreign service, then untold numbers of plaintiffs have been and – absent intervention by this Court – will be unnecessarily inconvenienced and prejudiced by having to re-file complaints, forcing them to pay multiple filing fees and wasting judicial resources. Any plaintiff who files a complaint near the expiration of the statute of limitations may be subject to a dismissal that, while technically without prejudice, may end the plaintiff's ability to sue as a practical matter. These outcomes nullify what the rulemakers hoped to achieve by relieving plaintiffs of the 120-day time limit in Rule

4(m). *See Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 881 (3d Cir. 1987) ("[T]he vagaries of [foreign] service render the [120-day] time limit too burdensome on a plaintiff.").

As discussed in the petition, this case presents an ideal and rare opportunity for this Court to provide much-needed guidance on this basic question of federal civil procedure, and this Court should take it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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